Orig.

IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION,

Appellant,

vs.

CECIL DURDEN, et al.,

Appellees.

CASE NO. 66,770

APPELLANT'S INITIAL BRIEF ON THE MERITS
DEPARTMENT OF TRANSPORTATION

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PRELIMINARY STATEMENT

For the purposes of this brief, the following symbols will be utilized:

"R" refers to the Record on Appeal.

"A" refers to the Appendix accompanying this brief.

STATEMENT OF CASE AND FACTS

During July and August, 1984, the Appellees, Durden and Stone, constructed outdoor advertising signs adjacent to Interstate 10 in Jackson County, Florida. The Record establishes, without contradiction, that at the time the Appellee's erected the signs, they knew that a permit was required in order for the sign to be legal; that they never applied for such a permit; that they were told by personnel of the Department that no signs would be permitted in the area where the sign was erected; and that they knew that what they were doing was contrary to the law. (R: 176, 182-183, 185) (A: 2-5)

Plaintiffs received notices of violations dated August 10, 1984 (Durden), and August 17, 1984 (Stone), for outdoor advertising signs owned by Plaintiffs located along I-10 in Jackson County, along with notification of the right to a 120.57 hearing. These signs were cited for violation of Section 479.11(1), Fla. Stat. (1983), and Fla. Admin. Code Rule 14-10.05(6), unpermittable zoning, and Section 479.07(1), Fla. Stat. (Supp. 1984), no state sign permit. On January 4, 1985, the Department posted the sign faces with a notice pursuant to Section 479.105(1)(a), stating that the sign was illegal and would be removed thirty (30) days after posting. In addition to the sign posting, the Department provided written notice to the Plaintiffs by certified mail. The notices were received by Mr. Durden on January 5, 1985, and Mr. Stone on January 7, 1985.

After receiving the August, 1984, notice, both Plaintiffs requested a hearing pursuant to Section 120.57, Fla. Stat., and the hearing was held on January 15, 1985, in Chipley, Florida. A recommended order was issued on March 27, 1985. Such order recommended that the Department remove the subject signs as such were found to be signs unpermitted and thus in violation of Section 479.07(1), Fla. Stat. (Supp. 1984). A Final Order has not yet been entered.

In the Complaint for Injunctive and Declaratory Relief, the Plaintiffs challenged the constitutionality of that portion of Section 479.105 which allowed the removal of illegal advertising signs within thirty (30) days of posting of the notice of violation even if an administrative hearing had been requested. (R: 1-8)

A hearing was held on the request for a preliminary injunction. After consideration of the evidence offered, the trial court denied the request citing the presumption of constitutionality; the fact that the Appellee's ignored the permitting process; and the insufficient showing of irreparable harm. (R: 193)

At the hearing for final injunctive relief, a stipulated statement of facts was submitted to the court. (R: 197-207) (A: 6-7) No additional evidence was offered by the Appellees. While the Appellees had alleged numerous constitutional violations in their complaint for injunctive relief, at the final hearing Appellees chose to limit their case to only two of the constitutional objections raised. (R: 305)

After consideration of the testimony submitted, the Memorandum of Law submitted by the parties, and argument of counsel, the lower court entered an order declaring the entire provision of Section 479.105, Fla. Stat. (Supp. 1984), as unconstitutional on its face and as applied to the Plaintiffs because it violated the procedural due process requirements of Art. I, Sec. 9, Fla. Constitution, and the 14th Amendment to the U.S. Constitution. (R: 277-278) (A: 8-9)

By Motion for Rehearing and Clarification (R: 281-284) (A: 10-11), the Department sought to point out to the lower court that only a portion of Section 479.105(1)(a) needed to be declared invalid in order to give effect to the constitutional challenge made by the Plaintiffs. It was maintained that the court need not declare the entire provision invalid and that if the court did not amend the order it would have the effect of denying the Department any recourse against unpermitted signs.

After hearing on the motion, the trial court declined to alter its order except to the extent that the order would not affect that portion of the statutory provision relating to cease work orders. (R: 355-356) (A: 12-13)

The Department timely appealed the amended order of the lower court. On March 25, 1985, the District Court of Appeal, First District, certified this appeal as one which required immediate resolution by the Florida Supreme Court. (R: 358) Jurisdiction was exercised by the Supreme Court on March 27, 1985. (R: 359)

SUMMARY OF ARGUMENT

In order to partake of the constitutional protection afforded under procedural due process it must be established that a deprivation of an interest encompassed within the Fourteenth Amendment's protection of liberty and property is at issue. There is no such liberty or property right involved when the government seeks to remove an outdoor advertising structure that was knowingly erected in complete disregard of the law and the established scheme of securing permits for such structures. The mere expectancy of the possibility of obtaining a permit does not give rise to a property interest protected by procedural due process standards.

Evaluation of the factors and justifications involved in identifying the specific dictates of due process, specifically the government's interest, including the function involved and the fiscal and administrative burdens that the additional procedural requirements would entail, the private interest affected, the risk of erroneous deprivation through the procedures used, and the availability of post-deprivation hearings, conclusively show that Appellees' procedural due process rights were not violated.

Thus, legislation which allows the removal of a non-permitted outdoor advertising structure after notice but prior to an administrative hearing is a valid exercise of the legislative power and is not in violation of procedural due process standards. Whatever "right" the owner of an unpermitted

sign may have, it is adequately protected by a post-take down administrative hearing and the availability of re-erection of the sign or payment of just compensation.

ARGUMENT

POINT I

APPELLEES HAVE NOT BEEN DEPRIVED OF ANY PROPERTY INTEREST ENCOMPASSED IN THE PROTECTION OF DUE PROCESS.

It is well established constitutional law that before a property interest can be taken from a person by governmental action, that person is to be afforded adequate notice and a fair hearing. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). To establish a procedural due process claim, a person must show that he has been deprived of a protected liberty or property interest encompassed in the due process clause. Garcia v. U.S., 666 F.2d 960 (5th Cir. 1982), cert. denied, 459 U.S. 832, 103 S.Ct. 73, 74 L.Ed.2d 72. In this case Appellees have not established that the actions of the Department of Transportation, have deprived them of any liberty or property right encompassed within the Fourteenth Amendment of the United States Constitution or Article I, Section 9 of the Florida Constitution's protection.

The existence of a legitimate property or liberty interest is prerequisite to an examination of whether governmental action is violative of the due process clause. Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976), vacated 98 S.Ct. 3118, 438 U.S. 901, 57 L.Ed.2d 1144, on remand 578 F.2d 1167. Although the due process protection for deprivation of liberty extends beyond physical restraints and the property

interests protected extend well beyond the actual ownership of tangible property, the range of interests protected by procedural due process is not infinite. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

A leading decision discussing what constitutes a right within the meaning of the due process clause is Board of Regents of State Colleges v. Roth, supra. In Roth, the Supreme Court held:

> [t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . . Property interests . . . are created and their dimensions are defined by existing rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. 408 U.S. at 578, 33 L.Ed.2d at 561.

In the instant case, it is unclear exactly what property interest is being taken from the Appellees. The Appellees have not been deprived of their right to engage in an occupation nor have they been deprived of any tangible aspect of their business. The removal of the sign structures themselves are not a deprivation as the Appellees are given an opportunity to remove and retain the structure. Further, should the Department ultimately remove the sign, there is nothing to prohibit the Appellees from claiming the material components of the structure held by the Department. The lost profits and business damages possibly suffered by the Appellees due to the lack of opportunity to advertise their businesses to the motoring public does not

constitute "property" in the constitutional sense. See: Florida Power and Light Company v. First National Bank and Trust Company of Riviera Beach, 448 So.2d 1141 (Fla. 1st DCA 1984). Nor do Appellees hold any property right in the expectancy of receiving an outdoor advertising permit as Appellees never applied for such permit nor did they establish that they had complied with the statutory requirements to have a permit issued. (R: 176, 182-183, 185) See: PICA Services, Inc. v. Behringer, 593 F.Supp. 113 (S.D.Fla. 1984).

Thus, there is no conventional property interest of Appellees being taken by the Department's action. What is being affected is the Appellees' asserted right to continue "using the highway" to transmit advertising messages to motorists. Walker v. State, Department of Transportation, 366 So.2d 96 (Fla. 1st DCA 1979), concurring opinion, p. 102; Moore v. Ward, 377 S.W.2d 881 (Ken.Ct.App. 1964); Ghaster Properties, Inc. v. Preston, 200 N.W.1s 328 (Ohio 1964). As noted in Ghaster:

> . . . the plaintiffs are not exercising a natural right . . . they are seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways . . . . The right asserted is not to own and use land or property, to live, to work, or to trade . . . its main feature is the superadded claim to use private land as a vantage ground from which to obtrude upon all the public traveling upon highways, whether indifferent, reluctant, hostile or interested, an inescapable propaganda concerning private business with the ultimate design of promoting patronage of those advertising. Id. at 334.

No evidence was presented by Appellees which would elevate this "superadded claim" to the status of a property interest within the meaning of the Fourteenth Amendment.

Also to be considered when reviewing the Appellees' alleged interference with a right to use the highway to transmit an advertising message, is the fact that the signs were erected adjacent to an interstate limited access facility, I-10. This court has reviewed a sufficient number of eminent domain cases to take judicial notice of the fact that when a limited access facility is to be constructed, the condemnor acquires not only a fee simple interest in the property, but also all rights of air, light, and view. See: State Road Department v. Southland, Inc., 117 So.2d 512, 518 (Fla. 1st DCA 1960), cert. denied 122 So.2d 407.

In order to comply with the requirements of Section 479.07(2)(b) (Supp. 1984), the permit application must be accompanied by a written statement that the person erecting the sign has the authorization of the landowner to do so. In this cause neither the pleadings, nor the testimony offered at either hearing established such permission had been granted. But, assuming permission was granted and a sign site was leased by Appellees, the owner of the property could convey no more right or interest than that which he held at the time of the lease. Since limited access, along with all rights of air, light and view were acquired, the landowner could not convey any right of view to the roadway.

It was incumbent upon the Appellees to establish not only that they had the permission of the landowner to erect the sign, but also that the landowner still retained a right of view that could be conveyed to the Appellee. Neither criteria were met by Appellees in the proceedings below.

The Appellees have failed to establish that even a semblance of a property right ever existed. The lower court therefore erred in declaring Section 479.105, Fla. Stat. (Supp. 1984), unconstitutional in that said section violated the constitutional guarantee of procedural due process of law since Appellees never established that they were deprived of a legitimate property or liberty interest within the meaning of the Fourteenth Amendment.

POINT II

FACTORS PRESENT IN THIS CAUSE JUSTIFY DEPARTURE FROM THE REQUIREMENT OF A PREDEPRIVATION HEARING AND SUPPORT THE LEGISLATIVE DETERMINATION OF SUMMARY REMOVAL OF UNPERMITTED SIGNS PRIOR TO ADMINISTRATIVE HEARING.

Assuming that Appellees have been deprived of a legitimate Fourteenth Amendment property interest, the specific dictates of due process must be identified as due process is flexible and calls for such procedural protections as the particular situation demands. Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978); Smith v. Organization of Foster Families, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977). As a general rule, an individual must be afforded an opportunity for a hearing before he is deprived of a significant property interest. However, there is an exception to this rule which, in certain situations, legitimizes the immediate seizure of property. In determining whether the summary administrative action falls within this exception, the courts have scrutinized several distinct factors and justifications.

A. Importance of underlying government interest.

Summary administrative actions by a governmental entity have been held proper in many cases after assessment of the validity and importance of the underlying government interest. Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); Mackey v. Montrym, 443

U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979); Memphis Light, Gas and Water Division v. Craft, supra; Dixon v. Love, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894); Denny v. Conner, 426 So.2d 534 (Fla. 1st DCA 1985); Larson v. Warren, 132 So.2d 177 (Fla. 1961); State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959).

The validity of Florida's regulation of outdoor advertising is well established. Elliot Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970); Hav-a-Tampa Cigar Co. v. Johnson, 149 Fla. 148, 5 So.2d 443 (1941); John H. Swisher and Son v. Johnson, 149 Fla. 148, 5 So.2d 441 (1941). Florida's interest in promoting highway safety has long been recognized as a basis for the regulation of outdoor advertising. The U.S. Fifth Circuit Court in Elliot Advertising Co. v. Metropolitan Dade County, supra, stated:

> The essential purpose of an advertising sign placed adjacent to a highway is to attract the attention of the motoring public long enough to convey a commercial message . . . the speed and density of modern expressway traffic, coupled with the braking limitations of the modern automobile, can conceivably make even the most insignificant amount of time during which a driver's attention is diverted a matter of direct consequences. Id. at 1152.

In an attempt to safely present information to the traveling public, the State of Florida enacted Chapter 479 as a valid exercise of its police power. Under Chapter 479, permits are required for all off premise signs in order to effectively

control the erection and maintenance of signs especially in requiring that signs are located in the appropriate areas. In fact, those signs without permits are deemed by the Legislature to be public and private nuisances. Section 479.105(1), Fla. Stat. (Supp. 1984).

In addition to highway safety, the need to protect revenue may justify summary administration action. Commissioner v. Shapiro, 424 U.S. 614, 98 S.Ct. 1062, 47 L.Ed.2d 278 (1976). By agreement with the United States Department of Transportation, dated January 27, 1972, the State of Florida was charged with "effectively controlling" the erection and maintenance of outdoor advertising signs. In a review of Chapter 479 conducted by the staff of the Senate Committee on Transportation (Feb. 1984), hereinafter referred to as Report (R: 208-242) (A: 14-49), the need for effective control was stressed:

> In view of the sanction of loss of ten percent of appropriated federal-aid highway funds for non-compliance with federal outdoor advertising control law, it is imperative that the department take swift action to effect immediate and continuing compliance with federal requirements. (R: 231) (A: 37)

The Report specifically addressed the issue of unpermitted signs:

> With regard to signs erected without having obtained the required permit from the department, enforcement is not presently adequate, and that the law should be amended to provide for removal of these signs after notice to the sign owner. (R: 233) (A: 40)

The public interest in avoiding the loss of ten percent of federal highway funding should be an influencing factor in determining that the summary removal of an illegal sign is constitutional.

Another important governmental interest is the need to maintain administrative efficiency. In Dixon v. Love, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977), the U.S. Supreme Court held that a state's interest in administrative efficiency was an important factor in determining that the initial decision to suspend a driver's license without a predecision hearing did not violate procedural due process. Were a predeprivation hearing required in the instant case, the only issue that would be determined is whether or not the subject sign was permitted. However, existing forums do not provide a satisfactory method adaptable to the present case. Further, the procedural constraints and probable delay involved in seeking a predeprivation formal judicial hearing is out of proportion to the relatively simple factual determination to be made. The findings in the Report show that of the over 500 requests for administrative hearings during a five year period involving outdoor advertising signs, 99 percent of those hearings relate to signs whose owners have not applied for and obtained permits as required by law. The Report further states:

> In many cases, circuit court proceedings intertwined with the administrative process and subsequent appeals result in several years of litigation. During the pendancy of these proceedings, the sign, even though never having been issued a permit remains standing. (R: 232) (A: 38)

Thus, to create an additional forum for the sole purpose of determining whether or not a sign has been permitted would only create another level of bureaucracy resulting in reduced administrative efficiency.

Another persuasive consideration for sustaining the enactment of the summary proceeding is the fact that at least twenty-five other states have enacted similar legislation. See: Ala. Code, Section 23-1-278; Alaska Stat., Section 19.25.150; Ark. Stat. Ann., Section 76-2512; Calif. Bus. and Prof. Code, Section 5462; Conn. Gen. Stat. Ann. Tit. 13A, Section 123(i); Del. Code Ann. Tit. 17, Section III; Ill. Ann. Stat. Ch. 121, Section 510(10); Iowa Code Ann., Section 306c.19; Maine Rev. Stat. Ann. Tit. 68, Section 2240; Md. Transp. Code Tit. 2, Section 8-748; Mich. Stat. Ann., Section 252.319(5); Minn. Stat. Ann., Section 173.13(11); Nev. Rev. Stat. tit. 35, Section 410.360; N.C. Gen. Stat. Ch. 136, Sec. 136-134; N.E. Cent. Code, Section 24-17-11; Ohio Rev. Code Ann. Tit. 55, Section 5516.12; Okla. Stat. Ann. Tit. 69, Section 1280(d); Pa. Stat. Ann. Tit. 36, Section 2718.110; R.I. Gen. Laws, Section 24-10.1-7; S.C. Code Ch. 25, Section 57-25-180; S.D. Codified Laws Ann., ch. 31-29-63.1; Tenn. Code Ann. Tit 54-21-105; Vt. Stat. Ann. Tit. 10, Section 497(b); Va. Code, Section 33.1-375; Wash. Rev. Code Ann., Section 47.42.080; Wis. Stat. Ann., Section 84.30(1).

The fact that there may be a risk of error in the Department's determination that a sign is unpermitted and that a sign may be erroneously removed does afford a rational predicate

for holding unconstitutional an entire statutory scheme that is generally followed in at least 25 states. Cf.: Parham v. J.R., 422 U.S. 584, 61 L.Ed.2d 101, 99 S.Ct. 2493 (1979). "Procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions." Parham v. J.R., 61 L.Ed.2d at 125.

Upon considering that the only statutory determination to be made is whether the sign has a permit, there is minimal risk of error in the process. Further, the administrative rules dealing with inspection of signs and implementing the enforcement aspects of Chapter 479 (See: pp. 18-19 of this Brief) are more than specific enough to control governmental action and reduce the risk of an erroneous deprivation. Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264, 69 L.Ed.2d 1, 31-32, 101 S.Ct. 2352 (1981).

Prehearing seizures have also been justified by the government interest in preventing the illegal use of property. Calico-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), reh den 417 U.S. 977, 94 S.Ct. 3187, 41 L.Ed.2d 1148; Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894). Chapter 479, Fla. Statutes (Supp. 1984), specifically provides that all signs erected without the required permit are illegal. Appellees were aware at the time they erected their signs that their actions were illegal, but proceeded anyway. (R: 176, 182-183, 185) (A: 2-5) To allow Appellees signs to remain standing, while judicial or formal

administrative hearings determine whether or not the subject signs were permitted would be to allow Appellees to benefit from their illegal actions, and to use their signs in an unlawful manner.

Also the incentive to delay on the part of signowners in Appellees' position would increase the number of hearings sought since the illegal signs would remain standing during the pendency of the proceedings. This incentive to delay would impose a substantial fiscal and administrative burden on the State. See: Mackey v. Montrym, supra.

Aesthetics and the protection of natural resources are also a government interest to be considered. One purpose for regulating outdoor advertising was the beautification of the highways. Section 479.015, Fla. Stat. (Supp. 1984), states among others, that the control of highway signs was necessary "to attract visitors to this state by conserving the natural beauty of the state" and "to preserve and promote the recreational values of public travel." Florida has long sustained regulatory measures based on aesthetic considerations. City of Miami Beach v. Ocean and Island Co., 147 Fla. 480, 3 So.2d 364 (1941); Merritt v. Peters, 65 So.2d 861 (Fla. 1953); Elliot Advertising, supra. The Legislature provided for outdoor advertising in specified areas so as to fulfill the purposes of Chapter 479. The location of Appellees signs in rural Jackson County are not in a permitted location because of the lack of any commercial activity. As determined by the Legislature, an outdoor advertising sign does not belong in an agrarian setting.

B. Underlying private interest and the degree of its impairment.

In reviewing summary administrative action which allegedly results in deprivation of property, the courts look to the nature of the private interest and the degree to which it has been impaired in determining whether protected due process rights have been violated. Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); Application of Eisenberg, 654 F.2d 1107 (5th Cir. 1981). Should Appellees have a Fourteenth Amendment property interest in communicating to the traveler on a public highway, such interest is not so vital as to overcome the government interests mentioned above. The nature of this private interest is diminished even farther in that the duration of the deprivation is limited in that Appellees may request an administrative hearing and should an error occur the Department, at Appellees' discretion, shall either pay just compensation or re-erect the sign in kind.

C. Availability of preseizure procedures to reduce risk of erroneous deprivation.

The existence of adequate preseizure administrative safeguards is a factor in evaluating whether summary action is consistent with due process. Dixon v. Love, supra; Memphis Light, Gas and Water Division v. Craft, supra; Hodel v. Virginia Surface Mining and Reclamation, supra. In the instant case, Chapter 479, Fla. Stat. (Supp. 1984), and Fla. Admin. Code Chapter 14-10 are specific enough to control governmental action

and reduce the risk of an erroneous deprivation. These provisions provide clear guidance to the Department in setting forth that unpermitted signs are nuisances and subject to summary removal after posting and notification to the owner. Also Fla. Admin. Code Chapter 14-10 provides a procedure whereby not only the Outdoor Advertising Inspector, but also the District Outdoor Advertising Administrator and the Central Outdoor Advertising Administrator, reviews the case and determines, by checking the Appellant's records, that the subject sign does not have the required permit. This procedure greatly reduces the risk of an erroneous deprivation, since the only determination made by the Appellant is one of fact - whether the sign is permitted or not, and this determination is reviewed at two other levels of administration.

D. Availability of post-deprivation hearing.

An additional factor in determining whether an administrative agency's summary deprivation of a property interest violates due process is the existence of a prompt post-deprivation hearing by which the aggrieved party may be compensated. Hodel v. Virginia Surface Mining and Reclamation Assoc., supra; Mackey v. Montrym, supra; Dixon v. Love, supra Lawton v. Steele, supra. Section 479.105(1)(a) specifically provides that Appellant shall post on the sign face and, should the owner be ascertainable, mail to the owner, a notice stating that the signowner has a right to request a hearing, which request must be filed with the Appellant within 30 days after the

date of the written notice. Once requested, a Section 120.57 administrative hearing is conducted. Further, pursuant to Section 479.105(1)(d) (Supp. 1984), should an error occur, the Department, at signowners discretion, shall either pay just compensation or reerect the sign in kind at the expense of the Department.

In evaluating the various factors discussed above and applying them to the instant case, the Department's summary removal of Appellees' signs was justified.

POINT III

THE TRIAL COURT ERRED IN STRIKING DOWN THE ENTIRE PROVISION OF SECTION 479.105, FLA. STAT., WHEN THE STATUTORY LANGUAGE DEEMED OFFENSIVE WAS SEVERABLE FROM THE REMAINDER OF THE PROVISION.

In the proceedings below the attack of the Appellees basically centered on that portion of Section 479.105(1)(a) which provides: "However, the filing of a request for a hearing will not stay the removal of the sign." Instead of merely striking the language perceived to be constitutionally offensive, the court struck down the entire provision of Section 479.105. Upon rehearing the court did amend its order to restore Section 479.105(2) which allows the Department to issue a cease work order on a sign that is being constructed without a permit. However, the remainder of the provision which authorized the Department to deal with the problem of unpermitted signs has been eliminated leaving the Department powerless to handle those situations.

As this court stated in Eastern Airlines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984):

> It is a fundamental principle that a statute, if constitutional in one part and unconstitutional in another part, may remain valid except for the unconstitutional portion. However, this is dependent upon the unconstitutional provision being severable from the remainder of the statute. The severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent. Cramp v. Board of Public Instruction, 137 So.2d 828 (Fla. 1962)

> Additionally, if the valid portion of the law would be rendered incomplete, or if severance would cause results unanticipated by the legislature, there can be no severance of the invalid parts; the entire law must be declared unconstitutional. Kass v. Lewin, 104 So.2d 572 (Fla. 1958). This Court succinctly summarized the general rules regarding severability in Presbyterian Homes of Synod v. Wood, 297 So.2d 556 (Fla. 1974), wherein the Court stated:
>
> > An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining valid provisions, that is, if the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; and the good and bad features are not inseparable and the Legislature would have passed one without the other; and an act complete in itself remains after the invalid provisions are stricken. Id. at 559.
>
> Id. at 317.

It is obvious from the provisions of Section 479.105 that the intent of the Legislature was to empower the Department with authority to control unpermitted outdoor advertising structures. That intent could still be accomplished by merely deleting the last sentence of Section 479.105(1)(a); deleting all of (1)(b); and deleting all of 1(d). By eliminating the above portions of the statute, the quick take down aspect of the statute would no longer exist, but the Department would still be able to proceed against unpermitted signs in much the same fashion as it did prior to the enactment of Section 479.105 and the repeal of Section 479.17, Fla. Stat. (1983). With the

allegedly offensive portions removed, the unpermitted sign could be cited and the sign would remain standing pending the outcome of a timely requested administrative hearing. Of course the long periods of delay between the citation and removal of the sign experienced prior to the enactment of Section 479.105 would be experienced again. (R: 232) (A: 38) But at least the ability to pursue the removal of such signs would be available.

If, as the circuit court determined below, Section 479.105(2) can be severed and remain intact, there is no justification for striking down Section 479.105(1)(a) except the last sentence; Section 479.105(1)(c) relating to the sufficiency of notice; and Section 479.105(3) relating to the costs of removal. Each of these portions can still logically function, and "the legislative purpose expressed in the valid provisions can be accomplished independently of those that are void . . ." Eastern Airlines, Inc., supra at 317.

Upon applying the principles set forth in the decision cited above, it is apparent that the court erred when it struck down all but subsection (2) of Section 479.105. The order should be reversed and the severable portions of Section 479.105, Fla. Stat. (Supp. 1984), reinstated.

CONCLUSION

The Order of the circuit court declaring Section 479.105, Fla. Stat. (Supp. 1984), unconstitutional as being in violation of procedural due process should be reversed and the statutory provision reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 10th day of April, 1985, to CHARLES M. WYNN, ESQUIRE, Post Office Box 793, Marianna, Florida 32446; and to NEIL BUTLER, ESQUIRE; and CATHI C. O'HALLORAN, ESQUIRE, Pennington, Wilkinson and Dunlap, Post Office Box 3985, Tallahassee, Florida 32303.

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