

Item # 47

SEMINOLE COUNTY GOVERNMENT
AGENDA MEMORANDUM

(Continued from 2/11/03)

SUBJECT: Kirchhoff Outdoor Advertising Sign Permit Application

DEPARTMENT: Planning & Development DIVISION: Planning

AUTHORIZED BY: Donald S. Fisher CONTACT: Matt West EXT. 7353

Agenda Date 3/25/03 Regular Consent Work Session Briefing
Public Hearing – 1:30 Public Hearing – 7:00

MOTION/RECOMMENDATION

1. Affirm staff's decision to deny the applicant's request for a billboard construction permit; or
2. Reverse staff's decision to deny the applicant's request for a billboard construction permit; or
3. Continue the matter to a date certain.

(District 5 – McLain) Matt West, Planning Manager

BACKGROUND

This matter was appealed to the Board of County Commissioners last year. The BCC appointed a Hearing Officer to review and make a recommendation regarding the appeal. In summary, the Hearing Officer recommends that the BCC affirm the decision to deny the application, citing that the moratorium ordinance clearly halts pending applications. The Hearing Officer's Recommended Order is attached. Please see the Summary and Conclusion starting on page 8 for a complete discussion.

This item was considered at the February 11, 2003 meeting and was continued to allow an opportunity for staff to brief the District Commissioner and for the appellant to meet with the District Commissioner.

STAFF RECOMMENDATION

Recommend acceptance of the hearing officer's recommendation to affirm the decision to deny the applicant's request for a billboard construction permit.

Attachment: Hearing Officer's Recommended Order
BCC Minutes, August 27, 2002

Reviewed by: KZC
Co Atty: KZC
DFS: _____
Other: MW
DCM: SS
CM: KZC
File No. rpd01

BEFORE THE SEMINOLE COUNTY
BOARD OF COUNTY COMMISSIONERS

WILLIAM KIRCHOFF,

Petitioner,

v.

PLANNING AND DEVELOPMENT DEPARTMENT
OF SEMINOLE COUNTY, FLORIDA

Respondent,

RECOMMENDED ORDER

Petitioner William Kirchoff appeals from the Respondent's denial of the application for a billboard construction permit filed on Petitioner's behalf by Exceptional Advertising, Inc.

Petitioner asserts that the permit should issue, as a matter of law, because the application was pending on the date that Seminole County's billboard moratorium ordinance took effect.

Alternatively, Petitioner asserts that he had received all required approvals prior to the date that the moratorium took effect, and the permit should have issued prior to the effective date, but for wrongful actions of the County staff that caused excessive delay in permit processing. The alleged wrongful actions include placing unnecessary requirements on the applicant, and failing to advise the applicant that an initial billboard construction permit application had been voided.

The Petitioner bears the burden of proof in this proceeding.

An evidentiary hearing was conducted on November 7, 2002, at the Seminole County Services Building, Sanford, Florida. Petitioner Kirchoff was represented by Brad Cooper, President of Exceptional Advertising, Inc. Petitioner and Mr. Cooper testified. Petitioner also called Deborah Leigh, Interim Program Manager of Seminole County Code Enforcement, as a

witness. Petitioner presented three exhibits (listed in Appendix "A"), all of which were admitted into evidence. Petitioner's Exhibits will be referred to as "Pet. Ex. ___." Seminole County objected to Petitioner's Exhibit 2, a briefing document produced by the County staff, on hearsay grounds. Therefore, no information in Exhibit 2 forms the basis for any finding of fact in the Recommended Order unless it was corroborated by other evidence.

Seminole County was represented by Assistant County Attorney Karen Z. Consalo. Seminole County called the following County staff as witnesses: Deborah Leigh, Sandra Neminski, Mahmoud R. Najda, Javier Torregrosa, and Don Fisher. Seminole County offered 16 exhibits designated "A" through "P" (listed in Appendix "A"), all of which were admitted into evidence without objection. Seminole County's Exhibits will be referred to as "Sem. Ex. ___."

UNDISPUTED FACTS

1. It is undisputed that Seminole County adopted a moratorium on billboard permits on January 23, 2001. The moratorium took effect on February 7, 2001. Ordinance 2001-2 states:

There is hereby imposed a moratorium upon the approval or issuance of any development permit authorizing the placement of any new outdoor advertising sign within the unincorporated areas of Seminole County. The moratorium . . . shall apply to all applications for a development permit for the placement of a new outdoor advertising sign(s) which are pending on the effective date of this ordinance

(Sem. Ex. B, pg. 3). Subsequently, Seminole County adopted a cap on the number of billboards in the County which prevents Petitioner from obtaining a billboard permit for an indeterminate period. (Sem. Ex. C) Petitioner does not challenge the validity of the moratorium ordinance or the billboard cap. This proceeding solely deals with whether Seminole County could lawfully apply the moratorium to refuse to issue Petitioner a billboard construction permit.

FINDINGS OF FACT

2. On July 25, 2000, the Seminole County Board of County Commissioners granted Mr. Kirchoff's request to re-zone the property that is the subject of the billboard permit application from A-1 (agricultural) to C-2 (commercial). The development order (Sem. Ex. F) states: "The owner seeks rezoning in order to place a billboard upon the Property . . ." Condition (3)(a) of the development order requires the applicant to undergo site plan review. It states: "Exact placement of the outdoor sign shall be accomplished during the site plan process. The applicant shall provide the County with a legal description of the sign location in conjunction with the application for a site plan." (Sem. Ex. F, pg. 4)

3. Subsequently, on October 13, 2000, Exceptional Advertising, Inc. (hereafter referred to as "Exceptional") filed an application for a permit to construct a billboard. (Sem. Ex. D) The application was signed by Douglas C. Ball as representative of the contractor and the owner. It is undisputed that Exceptional had not filed the site plan application required by the rezoning order prior to filing the construction permit application. Testimony at the hearing established that the October 13 permit application was routed from the Building Department to Planning and Development for review. Planning and Development refused to review the application because the required site plan review had not been completed.

4. At this point, the Building Department voided the billboard permit application. County records indicate that the permit application is "void" or was "voided" on October 31, 2000. (Sem. Ex. E) Petitioner Kirchoff and Brad Cooper testified that while they were advised that a permit would not issue until site plan review was complete, they were not made aware that the permit application was rejected. They believed that the construction permit application was

merely inactive and would be revived without further action on their part when site plan review was complete. Don Fisher, Director of the Planning and Development Division, testified that the County's standard procedure requires telephone notice to the applicant that the construction permit application had been rejected. However, no telephone logs were maintained to memorialize such communications. Petitioner and Brad Cooper acknowledged that a telephone call from County staff would have gone to Douglas Ball, who did not testify. Brad Cooper testified that Don Fisher stated to him that the permit application could not be located. Fisher, however, testified that he did not recall making such a statement.

5. On November 28, 2000, Exceptional submitted a site plan application to Seminole County. On December 14, 2000, the Development Review Staff faxed Exceptional a document entitled "Review Staff Comments." (Sem. Ex. H) The document requested information on a list of items to be addressed prior to site plan approval. The list includes filling on the site, traffic issues, and storm water management. An engineering firm was engaged to prepare a response.

6. On December 18, 2000, Deborah Leigh, Section Chief of the Seminole County Code Enforcement Division, signed a Florida Department of Transportation form concerning local land use approvals for the proposed billboard site. (Sem. Ex. P) She testified that the form was given to her by Douglas Ball, Exceptional Advertising's employee, with certain responses already filled in. The responses indicate that the local comprehensive plan land use designation and the zoning are appropriate for a billboard, and that the billboard site "is in compliance with all duly adopted local ordinances and has been or will be issued the necessary permits." (Id.)

7. The form is a FDOT document clearly intended to provide information to the FDOT. It is not a product of the Seminole County billboard permitting process. The form does

not represent that the information reflected thereon is a binding decision by the County. In addition, while Ms. Leigh reviews applications, she testified that her duties do not include making zoning or permitting decisions. In sum, the form is not a permit or approval, and it is not competent evidence that the billboard site had been found in compliance with Seminole County regulations.

8. On January 23, 2001, Seminole County adopted the billboard moratorium. (Sem. Ex. B) The moratorium took effect on February 7, 2001. The wording of the Ordinance clearly advises that the moratorium will apply to all billboard applications “which are pending on the effective date of this ordinance” (Sem. Ex. B., pg. 3)

9. On January 25, 2001, nearly six weeks after Exceptional received County staff’s comments on the site plan application, Exceptional requested a meeting with Mahmoud Najda, the Manager of the Development Review Division. The meeting was held on January 26, 2001. All site plan issues were resolved at the meeting. At the conclusion of the meeting Mr. Najda approved the site plan. Mr. Cooper testified that he expected the construction permit to be issued in due course, without any further action by Exceptional. He testified that Exceptional did not believe that the moratorium would apply to the pending application. In light of the clear wording of the ordinance, this assumption is clearly unjustified.

10. Upon learning that a second construction permit application was required, Exceptional filed a second application on February 1, 2001. The permit was processed until February 7, 2001, the day that the moratorium took effect, but was not issued prior to the moratorium taking effect. This period includes four business days, Thursday and Friday, February 1 and 2, and Monday and Tuesday, February 6 and 7. There is no evidence that any

improper or unlawful act by County staff caused the County to fail to complete review of the construction permit between February 1 and February 7. On its face, the fact that the County did not process and issue the permit in this period of time is not unreasonable.

11. Seminole County urges that there are also outstanding issues regarding an alleged fill violation, and a dispute over whether the Petitioner's site is within a nearby state road right-of-way, that were not resolved before the moratorium took effect on February 7, 2001. The evidence in the record, however, would not support delaying issuance of the construction permit on these grounds.

RECOMMENDED CONCLUSIONS OF LAW

12. In the written Final Argument, Petitioner contends that the County is estopped to deny the billboard permit under the pending ordinance doctrine set out in Smith v. City of Clearwater, 383 So. 2d 681 (Fla. 2d DCA 1980). This doctrine holds that an applicant is entitled to obtain a building permit under the existing zoning regulations so long as an amendment that would preclude the intended use is not pending when a proper application is made. In other words, the County could not deny an application on the basis of a change in zoning or other land development regulations that are amended while the application is pending. The pending ordinance doctrine, however, does not apply in the case of a properly enacted temporary moratorium, such as the Seminole County Ordinance, which simply halts the permitting process for a certain class of applications, and which states on its face that it applies to pending permit applications: "The moratorium . . . shall apply to all applications for a development permit for the placement of a new outdoor advertising sign(s) which are pending on the effective date of this ordinance" (Sem. Ex. B, pg. 3) (emphasis added). The validity of the moratorium

ordinance is not an issue in this proceeding.

13. The Petitioner also argues that he is entitled to rely on the representations expressed in the FDOT form executed by Deborah Leigh on December 18, 2001, to prove that the County had determined that the billboard site: “is in compliance with all duly adopted local ordinances and has been or will be issued the necessary permits” (Sem. Ex. P) before the moratorium took effect. The FDOT form, however, is intended solely to provide information to FDOT based on the best available information at the time the form is executed. It is not part of the County zoning or permitting process. Nor is there evidence that Ms. Leigh has authority to make zoning or permitting decisions. Therefore, Petitioner is not entitled to rely on the FDOT form as a permitting decision by Seminole County, or as evidence that the billboard site in fact satisfied all County regulations.

14. The Petitioner also argues that the County Development Review staff wrongfully caused a seven week delay in the site plan approval process by requiring Exceptional to address numerous issues “that were ultimately deemed unnecessary by the Development Review Division Manager.” (Petitioner’s Final Argument, para. 23) The evidence does not support this assertion. A reading of the Review Staff Comments (Sem. Ex. H) shows that the staffs’ issues were reasonably related to the application. The Division Manager, Mr. Najda, testified that Exceptional’s response satisfied the staffs’ concerns. He did not testify that the review items were unnecessary.

15. Finally, the Petitioner argues that he is entitled to rely on the initial construction permit application, despite the County’s action to void the initial application, because he was not informed that the permit was voided. The evidence of what notice was provided, and to whom,

is inconclusive. The evidence is discussed in paragraph 4 above. The Petitioner bears the burden of proof in this proceeding. The greater weight of the evidence does not establish that the County failed to notify the Petitioner or Exceptional that the permit was void.

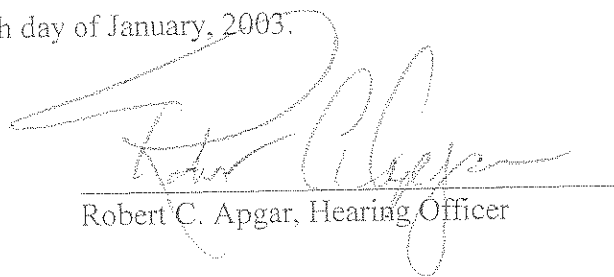
16. In addition, even if it were concluded that the County failed to notify Petitioner or Exceptional that the initial permit application had been voided, the evidence does not support a conclusion that lack of notice was a primary cause of injury to the Petitioner. At the hearing, Mr. Cooper was frank to acknowledge that Exceptional believed that the moratorium would not apply to its billboard application. Apparently, this belief was based on the pending ordinance doctrine set out in Smith v. City of Clearwater, 383 So. 2d 681 (Fla. 2d DCA 1980). As explained in paragraph 12 above, Exceptional's understanding of the law was incorrect. Thus, it was Exceptional's mistake of law, not lack of notice, that is primarily responsible for the fact that Exceptional did not expedite its response to the staff comments on the site plan, or check on the status of the prematurely filed billboard application at an earlier date. Under the facts of this case, the County would not be held responsible for the delay between the site plan approval on January 26, 2001, and the filing of the second billboard permit application on February 1, 2001.

SUMMARY AND RECOMMENDATION

As a matter of law, the pending ordinance doctrine set out in Smith v. City of Clearwater, 383 So. 2d 681 (Fla. 2d DCA 1980) does not apply to the Seminole County moratorium. The Seminole County moratorium ordinance clearly states that the moratorium halts pending applications. Further, Petitioner's reliance on the FDOT form is unjustified. The issues on which the County required a response in site plan review were reasonably related to the site plan, and did not cause unnecessary delay. Finally, the evidence does not prove that the County failed to

notify the Petitioner that the initial construction permit application was void. Moreover, under the circumstances, Petitioner and Exceptional were not justified in assuming that the initial application would remain pending, and would be reactivated and issued with no further action on their part. The undersigned recommends that the Board of County Commissioners AFFIRM the decision to deny Petitioner's application for a billboard construction permit and DISMISS the appeal.

Respectfully submitted this 10th day of January, 2003.



Robert C. Apgar, Hearing Officer

BEFORE THE SEMINOLE COUNTY
BOARD OF COUNTY COMMISSIONERS

WILLIAM KIRCHOFF,

Petitioner,

v.

PLANNING AND DEVELOPMENT DEPARTMENT
OF SEMINOLE COUNTY, FLORIDA

Respondent,

APPENDIX A

Petitioner's Exhibits

1. Letter dated March 29, 2001, from St. Johns River Water Management District to William Kirchoff
2. Memorandum from Planning & Development Department regarding William Kirchoff's appearance before the Board of County Commissioners on June 11, 2002
3. Letter dated October 8, 2002, from Exceptional Advertising, Inc., to Robert C. Apgar

Respondent's Exhibits

- A. Minutes of December 12, 2002, January 9, 2001, and January 23, 2001, Board of County Commission meetings
- B. Ordinance No. 2001-2 (imposing moratorium and confirmation of filing)
- C. Ordinance No. 2001-22 (limiting number of billboards)
- D. Application documents for permit application #00-9424
- E. Voided permit application #00-9424 and tracking sheets
- F. Development Order 2000-0037, Rezoning Ordinance No. 2000-38, and transmittal letter

- G. Site plan submission documents
- H. Site plan comments and inquiries
- I. Development Review Manager call log of January 25, 2001
- J. Notification of site plan approval
- K. Permit application #01-897 and tracking sheets
- L. E-mail notification of filing delay
- M. Permit application review procedures
- N. Applicants' Position Statement
- O. FDOT assertion of property ownership
- P. FDOT application

AUGUST 27, 2002

RE: Annexation of property at 430 West Drive approved by the City Commission. (cc: Planning)

7. Notice of Public Hearing at the City of Oviedo to consider site development for a Walgreens at River Oaks Reserve to be held on Thursday, September 5, 2002. (cc: Board, Planning & Development Director, Planning)
8. Copy of email dated August 21, 2002 from Bruce McMenemy to Margot Knight, United Arts RE: Clarification of request for copies of Seminole County's contract with United Arts. (cc: Board, County Manager, Community Services)
9. Letter dated August 19, 2002 from Jean J. Collock to Chairman RE: the success of the recent "Got Milk" Regional Soccer finals at Sylvan Lake Park. (cc: Board)
10. Letter dated August 18, 2002 from Bruce McMenemy to Board and County Manager RE: clarification and concerns regarding his public records request to United Arts.
11. Copy of Memo dated August 23, 2002 from Becky Noggle, Environmental Services to Sandy McCann, County Commission Records RE: Submissions into County Records. (cc: Board, County Manager, Deputy County Manager, Environmental Services Director)

COUNTY MANAGER'S REPORT

Mr. Grace stated with regard to Mr. Kirchhoff's billboard permit issue, he would like to request the Board authorize staff to use the same hearing officer previously used.

Motion by Commissioner Henley, seconded by Commissioner Van Der Weide to appoint the same hearing officer previously used for Mr. Kirchhoff's billboard permit issue.

Districts 1, 3, 4 and 5 voted AYE.

Mr. Grace stated the Growth Management law passed last year that a School Board member needs to be appointed to the Planning & Zoning Commission. He stated staff needs direction as to whether they should be a voting or non-voting member.

Motion by Commissioner Van Der Weide, seconded by Commissioner Maloy to approve the appointment of a School Board