BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

GODBY HOLDINGS, LLC, Petitioner,	:	
v.	:	Docket No.: OSAH-DOT-OA-1410364-60-Howells
DEPARTMENT OF TRANSPORTATION, Respondent.	:	

INITIAL DECISION

Petitioner Godby Holdings, LLC ("Godby" or "Petitioner") appeals the denial of an outdoor advertising sign permit application. The hearing was held on November 5, 2013. Michael J. Bowers, Esq. and Joshua M. Moore, Esq. represented Godby. Kenneth A. Thompson, Jr., Esq. represented the Georgia Department of Transportation ("DOT" or "Respondent"). For the reasons set forth below, DOT's denial of the permit application is **AFFIRMED**.

FINDINGS OF FACT

1.

On September 19, 2012, Godby submitted an application for an outdoor advertising sign to be located on property in the city of College Park, in Fulton County. The property is adjacent to State Route 407 (I-285) and State Route 403 (I-85). (Ex. DOT 1; Tr. 69.)

2.

A residential apartment complex is located on the property. The complex was built in 1972. It consists of approximately 49 buildings with 472 low-income apartments. The proposed location of the outdoor advertising sign is approximately 20 to 30 feet from one of the apartment buildings. First floor and second floor windows of that apartment building face the proposed location of the sign. (Exs. P-1, P-2, DOT 5; Tr. 14, 73, 75-77.)

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3.

The property at issue is zoned C-2 (Central Business), which is a commercial zoning designation. (Exs. P-3, P-4, DOT 1.) Under the College Park Zoning Ordinances, property zoned C-2 includes property that is zoned C-1 (Community Business). (Ex. P-3.) Property that is zoned C-1 allows "residential units which were established prior to 1973, including multiple unit dwelling developments" to be continued and rebuilt if damaged or destroyed, as long as the structure does not exceed the original density. (*Id.*)

4.

Duane King, formerly employed with DOT as an outdoor advertising agent, conducted the field investigation for the application submitted by Godby. (Tr. 71.) Mr. King recommended approving the application, solely based on the absence of another outdoor advertising sign within 1000 feet on the same side of the road. (Ex. DOT 2; Tr. 80.)

5.

Brian Asherbranner is employed with DOT as an outdoor advertising coordinator. (Tr. 68.) Mr. Asherbranner was Mr. King's supervisor. After reviewing Mr. King's field report, Mr. Asherbranner recommended denial of the permit. He made this recommendation because, despite the C-2 commercial zoning, the primary use of the property was residential, as it was an apartment complex. (Tr. 71-73.) After Mr. Asherbranner reviewed the field report and made his recommendation, he forwarded his recommendation to Mr. Wright. (Tr. 73.)

6.

William K. Wright, Jr. is the landscape architect manager for DOT. As part of his position, he has a supervisory role in the outdoor advertising unit. Mr. Wright is responsible for making the final decision to approve or deny an outdoor advertising permit. He made the decision to deny the permit

application submitted by Godby. (Tr. 91-93.)

7.

Mr. Wright issued the denial letter on October 16, 2012. In the letter, Mr. Wright stated the reasons for the denial of the permit application as follows:

> (1) Although the property is zoned commercial, the primary use of the property is a residential apartment complex and without any recognized commercial or industrial activity for outdoor advertising purposes. {23 CFR 750-708; O.C.G.A. § 32-6-71(7); & State Transportation Board Rules § 672-6-.01(t)}; and,
>
> (2) The proposed sign location is within 5000 feet of another permitted multi message sign on the same side of the roadway. {§ 32-6-75(c)}[1]

(DOT Ex. 3.)

CONCLUSIONS OF LAW

1.

As the applicant, Petitioner bears the burden of proof to show that the application for the permit should be granted. The standard of proof is preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.07 & .21.

2.

This proceeding is a de novo review of DOT's denial of Godby's permit application. The evidence is not limited to information presented to or considered by DOT, but the decision is based solely on the evidence admitted at the hearing. Ga. Comp. R. & Regs. r. 616-1-2-.21; *Longleaf Energy Assocs., LLC v. Friends of the Chattahoochee, Inc.*, 298 Ga. App. 753, 768 (2009) (concluding that the ALJ must consider the facts and law anew, and render an independent decision).

3.

Petitioner argues that the permit should be granted for the following reasons: (1) the primary use of

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the property is consistent with its zoning; and (2) alternatively, DOT exceeded its authority when it promulgated the regulatory definitions located at Ga. Comp. R. & Regs. §§ 672-6-.01(t) which defines "primary use," and (aa) which defines "Zoned Commercial or Industrial Areas." For the reasons that follow, the undersigned is not persuaded by Petitioner's arguments.

4.

In general, an outdoor advertising sign that is located within 660 feet of the nearest edge of the right of way and is visible from the interstate or primary highways is allowed if the proposed sign is located within an area zoned commercial or industrial, and the primary use of the property is consistent with its commercial or industrial zoning. O.C.G.A. § 32-6-72(4); Ga. Comp. R. & Regs. 672-6-.01(t).

5.

Georgia Code section 32-6-71(29) defines "zoned commercial or industrial areas" as areas:

> which are zoned for industrial or commercial activities pursuant to state or local zoning laws or ordinances as part of a comprehensive zoning plan. Strip zoning shall not be considered as a bona fide comprehensive zoning plan. Comprehensive zoning plans for the purposes of outdoor advertising only shall be approved by the board when an application for a permit has been made.

O.C.G.A. § 32-6-71(29).

6.

When a proposed sign is to be erected on land that is zoned commercial or industrial, a permit may be issued, only if, *inter alia*, the primary use of the property is consistent with its commercial or industrial zoning. Ga. Comp. R. & Regs. 672-6-.01(t).

7.

Section 32-6-71(7) defines "industrial or commercial activity" as "those activities commonly or

[1] This second reason is no longer applicable. (Tr. 94.) If Godby's application were approved, it would be allowed to

generally recognized as commercial or industrial." O.C.G.A. § 32-6-71(7). However, Section 32-6-71(7) further provides that certain activities are exempted from the definition of industrial or commercial activity. In pertinent part, Section 32-6-71(7)(F) states that "[a]ctivities conducted in a building principally used as a residence" shall not be considered commercial or industrial activity. O.C.G.A. § 32-6-71(7)(F).

8.

While Petitioner's first argument has some appeal, the undersigned concludes that it does not uphold the spirit of the outdoor advertising laws. It is true that the presence of the residential apartment complex on the College Park property, which is zoned C-2, does not violate the College Park zoning ordinance. However, that is because the apartment complex has been "grandfathered in." That College Park allows the pre-1973 apartment complex to remain, does not mean that an outdoor advertising sign should be allowed at that location.

9.

Stated differently, because College Park has decided to allow pre-1973 apartment complexes to remain in areas zoned commercial, does not mean that the primary use of the property is "consistent with its commercial or industrial zoning."[2] Ga. Comp. R. & Regs. 672-6-.01(t). As noted above, Section 32-6-71(29) defines "zoned commercial or industrial areas" as those which are zoned for industrial or commercial ***activities***." O.C.G.A. § 32-6-71(29) (emphasis added). Further, Section 32-6-71(7) defines "industrial or commercial ***activity***." O.C.G.A. § 32-6-71(7) (emphasis added). However, specifically exempted from the definition of commercial or industrial activity are "[a]ctivities conducted in a building principally used as a residence." O.C.G.A. § 32-6-71(7)(F).

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erect an electronic multiple message sign at the proposed location. (*Id.* at 94-95.)

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Simply put, a residential apartment complex is not, for the purposes of outdoor advertising, considered a commercial activity. O.C.G.A. § 32-6-71(7)(F). Therefore, the primary purpose of the residential apartment complex (i.e., providing living quarters) is not consistent with a commercial zoning designation. Ga. Comp. R. & Regs. 672-6-.01(t). Further, this interpretation is in keeping with the policy of regulating the location of outdoor advertising signs. *See* O.C.G.A. § 32-6-70(a) ("all outdoor advertising which does not conform to the requirements of this part is a public nuisance"). The fact that Section 32-6-71(7)(F) exempts residential property from the definition of commercial or industrial activity evidences an intent to refrain from placing outdoor advertising signs outside of people's homes.

10.

In the alternative, Petitioner argues that DOT exceeded its authority when it promulgated the regulatory definitions located at Ga. Comp. R. & Regs §§ 672-6-.01(t) which defines "primary use," and (aa) which defines "Zoned Commercial or Industrial Areas."[3] Specifically, Petitioner argues that Section 32-6-72 merely requires that the property be zoned commercial or industrial, and that DOT's regulation requiring the primary use of the property to be consistent with the zoning designation impermissibly adds another requirement. *See North Fulton Med. Ctr., Inc. v. Stephenson*, 269 Ga. 540, 543-44 (1998).

11.

It is a well know rule of statutory construction that "statutes 'in pari materia,' i.e., statutes relating to the same subject matter, must be construed together." *United States Bank Nat'l Ass'n v. Gordon*, 289

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[2] In fact, a building or business that is allowed to remain under a grandfather clause is considered to have an inconsistent or "non-conforming" use. *See Haralson Cnty. v. Taylor Junkyard*, 291 Ga. 321 (2012); *see also Thurman's Auto Parts & Wrecker Svc. v. Cobb Cnty.*, 248 Ga. 826 (1982).

[3] The undersigned notes that Section 32-6-90 provides the DOT with the authority to promulgate rules and regulations governing the issuance and revocation of outdoor advertising permits. O.C.G.A. § 32-6-90.

Ga. 12, 15 (2011), quoting *Willis v. City of Atlanta*, 285 Ga. 775, 776 (2009). Thus, Sections 32-6-71 and 32-6-72 must be construed together. Section 32-6-71(7), for the purpose of outdoor advertising, exempts certain activities from the definition of industrial or commercial activity. When Sections 32-6-71(7), (29), and 32-6-72 are read together, it is clear that a local commercial or industrial zoning designation, without any inquiry into the activity taking place on the property is not the end of the story. Otherwise, there would be no reason to define what is meant by "zoned commercial and industrial areas" in Section 32-6-71(29) or "industrial or commercial activity" in Section 32-6-71(7). These provisions would be superfluous.

12.

As Sections 32-6-71(7) and 32-6-71(29) address the type of activity taking place on the property, DOT's rule requiring the primary purpose of the property to be consistent with its commercial or industrial zoning is consistent with, and does not enlarge or narrow the scope of, the provisions in Sections 32-6-71(7), 32-6-71(29), and 32-6-72. Rather, DOT's rule merely helps to administer the state's outdoor advertising laws.

13.

Based on the evidence presented, the undersigned concludes that Godby has failed to prove by a preponderance of the evidence that its application for an outdoor advertising permit should have been granted. Although the property at issue is zoned commercial, the primary use of the property is to provide living quarters, as it is a residential apartment complex. Thus, the primary use is not consistent with its commercial zoning. O.C.G.A. §§ 32-6-71(7)(F), (29); Ga. Comp. R. & Regs. 672-6-.01(t).

DECISION

For the foregoing reasons, DOT's decision to deny Godby's outdoor advertising permit application is **AFFIRMED.**

SO ORDERED this 6th day of December, 2013.

Stephanie M. Howells

STEPHANIE M. HOWELLS
Administrative Law Judge

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