IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

KURT MCLAUGHLIN, Petitioner,	:	
v.	:	Docket No.: OSAH-DOT-OA-1726721-106-Schroer
GEORGIA DEPARTMENT OF TRANSPORTATION, Respondent,	:	

INITIAL DECISION

Petitioner Kurt McLaughlin appealed the denial by the Georgia Department of Transportation ("GDOT") of his application for an outdoor advertising sign permit. The hearing in this matter was conducted on May 8, 2017. Petitioner was represented by E. Adam Webb, Esq., and Respondent was represented by Ronald J. Freeman, Sr., Esq. and Bethany White, Esq. Following the hearing, the parties filed post-hearing briefs, and the deadline for issuing the decision was extended to August 25, 2017.

For the reasons stated below, GDOT's decision is **AFFIRMED.**

I. FINDINGS OF FACT[1]

Petitioner's Proposed Sign

1.

On or about September 1, 2016, Petitioner filed an application for an Outdoor Advertising Sign Permit (Application No. 1000534) with GDOT, seeking to erect a multiple

[1] To the extent that certain findings of fact are more appropriately classified as conclusions of law, they should be so construed. To the extent that certain conclusions of law are more appropriately classified as findings of fact, they should be so construed.

message sign structure on the east side of Georgia State Route 400 ("Georgia 400"), at or about milepost 30.72 in Cumming, Georgia. (Exhibit R-2.)

2.

GDOT considers Georgia 400 to be a "limited access highway," which is a high-volume, lower-grade roadway that can accommodate traffic traveling at high speeds. Limited access highways do not have any "at-grade" intersections or driveways and are only accessible through on- and off-ramps. Limited access highways are very similar to the roads that make up the interstate highway system in terms of design characteristics, such as the number of lanes, the width of the shoulders, and the radius of curves.[2] (Tr. 18-19, 43, 89-92.)

3.

Petitioner proposes to erect a multiple message sign near the northbound ramp from Georgia 400 onto State Route 20 (Buford Highway) in Cumming (Petitioner's Proposed Sign"). Once off the Georgia 400 ramp, State Route 20 quickly becomes a busy, commercial area, with multiple businesses, particularly on the northeast side of State Route 20. Although there are no other outdoor advertising signs permitted along Georgia 400 in that immediate area, there are a number of outdoor advertising signs, both permitted and unpermitted,[3] on State Route 20. One of these signs, which was permitted by GDOT under Permit No. C0239, is located on the southwest side of State Route 20, approximately 599 feet from the edge of the Georgia 400 ramp

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[2] Michael Hester, GDOT's outdoor-advertising manager, testified that Georgia 400 has been functionally classified as a freeway and that Georgia's functional classification has been approved by the U.S. Department of Transportation's Federal Highway Administration ("FHWA"). Mr. Hester did not have any documentation of this approval at the hearing. (Tr. 56-57.)

[3] On-premises signs do not require a GDOT permit. O.C.G.A. § 32-6-72(3); Ga. Comp. R. & Regs. 672-6-.03(2)(b); see Ga. Comp. R. & Regs. 672-6-.01(s). For example, on the far side of State Route 20, there is a billboard for a Racetrac gas station that is located on site at the gas station. It is considered an on-premises sign and does not require a permit. (Tr. 17-18.)

("C0239 Permitted Sign"). The C0239 Permitted Sign is visible, although not readable, from Georgia 400. (Tr. 19, 20-21, 27, 149, 167-68; Exs. R-3, R-6, R-7.)

The 500-Foot Rule and the Denial of Petitioner's Application

4.

The Georgia General Assembly has authorized GDOT to regulate outdoor advertising and has established certain prohibitions for the erection and maintenance of signs along the state highway system.[4] Among other rules, the General Assembly has enacted what is sometimes referred to as the "500-Foot Rule," which provides that no sign shall be erected or maintained that "is located adjacent to an interstate highway and which is within 500 feet of another sign on the same side of the highway." O.C.G.A. § 32-6-75(a)(17). The purpose of this and other provisions of the Georgia Outdoor Advertising Act is to preserve the aesthetic order along Georgia roadways and avoid the unsafe distraction of drivers.[5] (Tr. 19, 37.)

5.

Under its authority to regulate outdoor advertising, GDOT has adopted regulations regarding the methodology for measuring the distance between signs for purposes of applying the 500-Foot Rule. Ga. Comp. R. & Regs. 672-6-.05(1)(e)(3)(iii). GDOT's rules provide that "[a]ll spacing measurements shall be measured perpendicular to and along the nearest edge of the pavement." Id.[6] In this case, GDOT measured the distance between Petitioner's Proposed Sign and the C0239 Permitted Sign using the methodology set forth above. That is, GDOT personnel

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[4] O.C.G.A. §§ 32-6-70, -75.

[5] See Turner Commc'ns Corp. v. Ga. Dep't of Transp., 139 Ga. App. 436, 438 (1976) ("The intent of the General Assembly, when the entire Act is read together, is to protect the public *traveling along the highway* from distractions, from aesthetic desecration and from nuisances all associated with the proliferation of signs in a concentrated area along the highway.") (emphasis in original).

[6] See Turner Commc'ns Corp., 139 Ga. App. at 438.

drew parallel lines from the two signs to the edge of the pavement on the Georgia 400 ramp. The distance between the two parallel lines as measured perpendicular to and along the nearest edge of the ramp is less than 100 feet. (Tr. 33-36, 168; Exhibits R-4, R-5.)

6.

Because Petitioner's Proposed Sign, if erected, would be well within 500 feet of the C0239 Permitted Sign, GDOT denied Petitioner's application on December 6, 2016.[7] (Ex. R-1.)

Petitioner's Appeal

7.

Petitioner appealed GDOT's denial of the application on a number of grounds. Petitioner's main argument was that it was improper for GDOT to use the C0239 Permitted Sign as a disqualifying sign because it was not located along Georgia 400. Petitioner did not contest the accuracy of GDOT's measurements of the distances between the two signs, but argued that GDOT should not have considered such measurements because the C0239 Permitted Sign was not on the "same side of the highway" as Petitioner's Proposed Sign. Rather, Petitioner argued that the C0239 Permitted Sign is adjacent to and permitted for State Route 20, not Georgia 400. In addition, Petitioner, who has been actively involved in the outdoor advertising business in Georgia for many years, testified that he was unaware of GDOT ever denying an outdoor advertising permit for a sign on an interstate road because of its proximity to a sign on a separate state road. (Tr. 110-11.)

8.

Petitioner further argued that GDOT improperly used the Georgia 400 ramp in determining that the C0239 Permitted Sign was "erected or maintained within 660 feet of the

[7] Although GDOT also included a second reason for denial of Petitioner's application, namely the lack of access to the proposed location, GDOT abandoned this ground for denial at the administrative hearing. (Tr. 96.)

nearest edge of the right of way."[8] Petitioner argued that such measurement should have disregarded the ramp, as ramps should not be included in the right of way when the measurement is taken within the limits of a municipality. (Tr. 61-62, 109-10). In his hearing request, Petitioner cited Code Section 32-6-75(a)(18) and Ga. Comp. R. & Regs. 672-6-.05(1)(e)3.(ii) in support of this argument. (Ex. R-2.) According to Petitioner, the C0239 Permitted Sign is approximately 1,222 feet from the edge of Georgia 400 when the ramp is excluded. In response, GDOT introduced testimony that the Georgia 400 ramp is part of the interstate highway and, thus, included in the determination of the "nearest edge of the right of way."[9] (Tr. 64.)

9.

Finally, at the hearing and in post-hearing briefs, Petitioner argued that there are numerous examples of GDOT ignoring signs located on state roads when permitting signs on Georgia's interstate highways under the 500-Foot Rule. For example, Petitioner testified regarding a permitted sign located on the ramp off of I-285 onto Camp Creek Parkway (State Route 6) near the Atlanta airport in East Point, Georgia. According to the evidence in the record, GDOT initially approved an application for a permit for an outdoor advertising sign at I-285 and Camp Creek Parkway in or around 1978 ("04524 Sign").[10] Almost thirty years later, in or around 2007, GDOT approved an application for a permit for a billboard on the south side of Camp Creek Parkway ("03105 Sign"), which was within 500 feet of the 04524 Sign. In addition, Petitioner testified that GDOT recently has permitted another sign nearby on the south side of Camp Creek Parkway, as well as two others across the street on the north side of Camp Creek

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[8] See O.C.G.A. § 32-6-72.

[9] According to Mr. Hester, the right of way consists of "the parcels that have to be purchased and owned around the interstate . . ." (Tr. 62-63.) "[W]hen there are ramps," he testified, "the right of way widens because those ramps are part of the interstate." (Tr. 63.)

[10] It appears from the exhibits that Permit No. 04524 was renewed on April 6, 2007. (Ex. P-10.)

Parkway.[11] According to Petitioner, all of these signs permitted on Camp Creek Parkway, including the 03105 Sign, are visible from I-285. Moreover, under the methodology for measuring distance between signs under the 500-Foot Rule, Petitioner estimated that the 04524 Sign and the 03105 Sign would be only 10 to 20 feet apart. GDOT's outdoor advertising manager, Michael Hester, could not testify with absolute certainty as to why the permits for the signs were granted, but speculated that it was possible GDOT had granted permits by mistake in the past. (Tr. 76-77, 152-160; Exs. P-9, P-10, P-11.)

10.

In the post-hearing briefs, Petitioner cited four other examples where GDOT has permitted signs that are physically located on separate roadways, but that are both visible from an interstate roadway and are within 500 feet of one another when measured under the 500-Foot Rule methodology. Specifically, Petitioner cited signs located at (1) I-575 and State Route 92 in Woodstock, Georgia; (2) I-85 and State Route 34 in Newnan, Georgia; (3) I-75 and I-285 in Forest Park, Georgia; and (4) I-185 and State Route 27 in Columbus, Georgia. (Petitioner's Supplemental Brief on Equal Protection, filed on June 2, 2017 (hereinafter "Pet'r Br.").)

11.

Upon review of the evidence submitted by Petitioner with respect to the first example, it appears that GDOT issued a permit for a billboard located in the vicinity of I-575 and State Route 92 (Permit No. D1715) to Advantage Advertising in 2002.[12] (Pet'r Br., Attach. C.) On or about May 5, 2005, GDOT issued a permit for another billboard near I-575 and State Route 92 (Permit No. D2417) to Shark Ads, Inc. (Pet'r Br., Attach. B.) In his post-hearing brief,

[11] Petitioner did not submit any documentation regarding GDOT's approval of these recent permits.

[12] Advantage Advertising sold this billboard to Lamar Outdoor Advertising, Inc. (hereinafter "Lamar") on January 1, 2004, after which GDOT transferred the permit to Lamar. (Pet'r Br., Attach. C.)

Petitioner contended that the signs permitted by Permit No. D1715 and Permit No. D2417 were "within 500 feet of each other when using 1-575 as the frame of reference" and "plainly visible" from I-575. In support of this argument, Petitioner submitted aerial and street-level photographs. (Pet'r Br. Attach. A, D.) The aerial photograph submitted by Petitioner does not include a scale or other indication of the distance between the two signs. (See Pet'r Br., Attach. A.)

12.

With respect to the second example, Petitioner submitted exhibits indicating that GDOT issued a permit for a billboard located in the vicinity of I-85 and State Route 34 (Permit No. D1933) to JDN Realty on or about August 28, 2003.[13] (Pet'r Br., Attach. F.) Subsequently, GDOT issued a permit for another billboard near I-85 and State Route 34 (Permit No. D3346) to Southern Media on or about October 20, 2008.[14] (Pet'r Br., Attach. G.) According to Petitioner, GDOT issued Permit No. D3346 to Southern Media despite the fact that the distance between the proposed billboard and the billboard permitted by Permit No. D1933, measured in accordance with the methodology GDOT described at the hearing, was less than 500 feet. Petitioner represented that both signs were visible from I-85, and attached an aerial and a street-level photograph of both billboards to his post-hearing brief. (Pet'r Br., Attach. E, H). The aerial photograph includes a purported measurement of the distance between the two billboards. (Pet'r Br., Attach. E.) According to a notation on the aerial photograph, the billboards are 472.28 feet apart as measured alongside I-85. (Id.) Petitioner did not explain the methodology by which this measurement was obtained at the hearing or in post-hearing briefs. (See id.)

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[13] CBS Outdoor (aka Viacom) obtained ownership of the billboard in 2005. GDOT transferred the permit to CBS Outdoor on or about October 6, 2009. (Pet'r Br., Attach. F.)

[14] GDOT transferred the permit to Lamar in 2014 after that company purchased the billboard. (Pet'r Br., Attach. F.)

13.

Petitioner did not submit documentation evidencing that GDOT had granted permits for the billboards located in Forest Park or Columbus, which were Petitioner's third and fourth additional examples. Instead, Petitioner submitted two aerial photographs, each bearing notations regarding the purported distance between two points (presumably the billboard sites) located alongside I-185 and I-75, respectively. (Pet'r Br., Attach. I, K). The notations on the aerial photographs indicate that the distances between the billboards were less than 500 feet. (Id.) Petitioner did not explain the methodology by which these measurements were obtained, but did submit street-level photographs of the billboards to demonstrate that they were visible from I-185 and I-75. (Pet'r Br., Attach. J, L).

14.

Citing the foregoing examples as comparators, Petitioner asserted that GDOT had intentionally treated him differently from other similarly-situated permit applicants without any rational basis for doing so in violation of the Equal Protection Clauses of the United States and Georgia Constitutions.[15] At the administrative hearing, Mr. Hester acknowledged that over the past forty years, GDOT has made some mistakes and permitted some signs that do not comply with the 500-Foot Rule as it has been applied in this case. Mr. Hester also testified that because of limited personnel and resources, GDOT has not made it a priority to revisit and institute revocation proceedings against previously-issued permits that may have been issued in error. Rather, the agency prioritizes applying the rules and regulations correctly to current applications as they are filed. (Tr. 59-60, 76, 83.)

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[15] U.S. Const. amend. XIV, § 1; Ga. Const. art. I, § I, para. III.

II. CONCLUSIONS OF LAW

1.

Petitioner is an applicant for a permit. Therefore, Petitioner bears the burden of proof. Ga. Comp. R. & Regs. 616-1-2-.07(1). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

The Georgia Outdoor Advertising Act (hereinafter "the Act") authorizes outdoor advertising signs that provide information in the specific interest of the traveling public in areas zoned commercial or industrial. O.C.G.A. § 32-6-72(4). As set forth above, such signs are regulated by GDOT, which has the authority to issue permits. O.C.G.A. §§ 32-6-79, -90. GDOT may issue permits for outdoor advertising signs located within 660 feet of the nearest edge of the right of way of controlled routes, in areas zoned commercial or industrial that are visible from the main traveled way. O.C.G.A. §§ 32-6-72, -79, -90; Ga. Comp. R. & Regs. 672-6-.03(1)(a)(1)(ii). However, the Act precludes GDOT from issuing a permit for a sign that "is located adjacent to an interstate highway and which is within 500 feet of another sign on the same side of the highway," unless the signs are separated by buildings or other obstructions such that only one sign face is visible from the interstate highway. O.C.G.A. § 32-6-75(a)(17); see O.C.G.A. § 32-6-90 ("The department is authorized to promulgate rules and regulations governing the issuance and revocation of permits for the erection and maintenance of outdoor advertising which is authorized by Code Sections 32-6-72 and 32-6-73 and which is not prohibited by this part.").

3.

As discussed in the Findings of Fact, GDOT's rules provide that, for purposes of determining the distance between signs, "[a]ll spacing measurements shall be measured perpendicular to and along the nearest edge of the pavement." Ga. Comp. R. & Regs. 672-6-.05(1)(e)(3). In this case, GDOT personnel calculated the distance between Petitioner's Proposed Sign and the C0239 Permitted Sign by drawing parallel lines from the two signs to the edge of the pavement on the Georgia 400 ramp and measuring the distance between the two parallel lines. (Tr. 33-36, 168; Exhibits R-4, R-5.)

A. GDOT was required to deny Petitioner's permit application under the Act.

4.

GDOT properly denied Petitioner's permit application, as Petitioner's Proposed Sign would be erected within 500 feet of the C0239 Permitted Sign and both signs would be adjacent to, on the same side of, and visible from, Georgia 400, an interstate highway.

The two signs are on the same side of Georgia 400.

5.

The Georgia Court of Appeals addressed GDOT's application of the 500-Foot Rule[16] in Turner Communications Corporation v. GDOT, a case with facts similar to those at bar. In that case, Turner Communications (hereinafter "Turner") sought a permit from GDOT to erect two signs: one alongside I-20 and constructed for display to motorists thereon and one on the north side of Peters Street, a "primary highway," and constructed for display to motorists traveling on Peters Street. 139 Ga. App. 436 (1976). Both signs were on the north side of I-20 and, if

[16] Specifically, the Court of Appeals interpreted Section 95A-916 of Georgia's Control of Outdoor Advertising Statute, which is identical to the provision at issue in this case in all relevant respects. See Turner Commc'ns Corp., 139 Ga. App. at 436.

erected, would be within 500 feet of each other according to GDOT's measurements. Id. at 437. After GDOT denied Turner's applications, citing the 500-Foot Rule, Turner argued that the sign on the north side of Peters Street was neither adjacent to nor on the same side of I-20, as it was on the side of Peters Street opposite from I-20. Id. The Court of Appeals held that, for purposes of applying the 500-Foot Rule, signs are "adjacent to" an interstate highway if they are within 660 feet of the edge of the right of way, regardless of whether the signs are separated by an intervening road. Id. at 437–38. The Court of Appeals rejected Turner's argument that the sign on the north side of Peters Street was not "adjacent to or on the same side of I-20," reasoning that the 500-Foot Rule, which it characterized as a "clear legislative proscription," could not "be thwarted by the mere fact that other roads . . . intervene between the sign and the Interstate highway." Id. The Court of Appeals further reasoned that, while the signs were not on the same side of Peters Street, they were nonetheless on the same side—i.e., the north side—of I-20. Id. at 438.

6.

The Court of Appeals' holding in Turner Communications bears heavily on the outcome of this case. Petitioner's Proposed Sign and the C0239 Permitted Sign are both on the southeast side of Georgia 400. Therefore, they are on the "same side" of Georgia 400. See Turner Commc'ns Corp., 139 Ga. App. at 438. Further, as both signs are within 660 feet of the Georgia 400 ramp, they are "adjacent to" Georgia 400 for purposes of applying the 500-Foot Rule. See id. at 437–38. The fact that both signs would be visible from Georgia 400 is not in dispute. In accordance with the holding in Turner Communications, the location of C0239 on another roadway—in this case, State Route 20—is inconsequential given the legislature's clear proscription. Id.

Georgia 400 is an interstate highway.

7.

Although Petitioner disputes that Georgia 400 is an interstate highway,[17] the Court concludes, based on the evidence presented at the hearing, that this contention lacks merit. As an initial matter, GDOT did not have the burden of proof in this case. Rather, GDOT's obligation to produce evidence regarding whether the permit was properly denied, including evidence that Georgia 400 meets the definition of an "interstate highway," would arise only after Petitioner, as the party with the burden of proof, presented prima facie evidence that Georgia 400 was not an interstate highway and thus not subject to the 500-Foot Rule. See generally Hyer v. Holmes & Co., 12 Ga. App. 837, 846-47 (1913) ("the burden of proof may be shifted when sufficient facts are established to raise a strong presumption in favor of the negative"). At the hearing, Petitioner did not present any facts to show that Georgia 400 was not federally-approved as an interstate highway, and thus, GDOT had no burden to produce evidence that it was so approved. Moreover, even assuming that the burden did shift to GDOT to prove that Georgia 400 meets the statutory definition of an interstate highway, the Court concludes that it met such burden. Specifically, although GDOT did not produce documentary evidence that the United States Secretary of Transportation approved GDOT's designation of Georgia 400 as an interstate highway,[18] GDOT introduced credible testimony from knowledgeable witnesses that Georgia 400 had been so approved, and Petitioner presented no credible evidence to rebut such testimony.

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[17] The Georgia Code defines an "interstate highway" as "any road of the state highway system which is a portion of The Dwight D. Eisenhower System of Interstate and Defense Highways located within this state, as officially designated or as may hereafter be so designated by the department and approved by the United States Secretary of Transportation pursuant to the provisions of *Title 23, Section 103, United States Code*, or any limited-access highway as officially designated or as may hereafter be so designated by the department and approved by the United States Secretary of Transportation pursuant to the provisions of *Title 23, Section 103, United States Code*." O.C.G.A. § 32-6-71(9).

[18] Id.

See generally Frasard v. State, 322 Ga. App. 468, 472 (circumstantial evidence from testimony of trained individuals sufficient to prove Department of Public Safety's approval of speed-detection device; certified copy of DPS's approved list not required).

Ramps are part of the interstate system.

8.

Petitioner also argued that ramps should be disregarded when the measurement of the 660-foot limit takes place within an incorporated municipality and in his hearing request cited purported statutory and regulatory authority for this proposition. See O.C.G.A. 32-6-75(a)(18); Ga. Comp. R. & Regs. 672-6-.05(1)(e)3.(ii). However, the statute and regulation cited by Petitioner do not appear to be applicable in this case. See id. Code Section 32-6-75(a)(18) forbids the erection or maintenance of a sign that "[i]s located outside of the corporate limits of a municipality and adjacent to an interstate highway within 500 feet of an interchange, intersection at grade, or safety rest area." It is a proscription similar to, but entirely independent from, the 500-Foot Rule. Compare O.C.G.A. § 32-6-75(a)(17), with O.C.G.A. § 32-6-75(a)(18).[19] Accordingly, any provisions regarding measurement expressed therein have no bearing on the measurements to be applied in determining whether signs are in violation of the 500-Foot Rule.

9.

Conversely, GDOT introduced credible and persuasive testimony that ramps form part of interstate highways and are thus counted as part of the right of way. This interpretation comports with the statutory definition of "right of way," which is, "generally, property or any interest therein . . . acquired for or devoted to a public road." O.C.G.A. § 32-1-3(25). The primary, and perhaps sole, purpose of the exit ramp at issue is to allow egress of traffic from Georgia 400. In

[19] Ga. Comp. R. & Regs. 672-6-.05(1)(e)3.(ii) is a regulation promulgated to implement Code Section 32-6-75(a)(18).

that respect, it is devoted to Georgia 400 and forms part of the right of way. See Whiteheart v. Garrett, 493 S.E.2d 493, 494 (N.C. Ct. App. Dec. 2, 1997) (interchange ramps built to connect interstate highway with non-interstate roadway considered part of interstate system). GDOT's interpretation is also consistent with the Act's distinction between the right of way and the "main traveled way," which is "the traveled way of a highway on which through traffic is carried . . . [and] does not include such facilities as frontage roads, turning roadways, or parking areas." O.C.G.A. § 32-6-71(9).

B. Petitioner failed to demonstrate that GDOT's action violated the Equal Protection Clause of the United States or Georgia Constitutions.

10.

In its post-hearing brief, GDOT asserted that Petitioner lacked standing to challenge GDOT's action on the basis that it violated equal protection. This assertion is without merit, as Petitioner established that he suffered injury-in-fact directly caused by GDOT's action and his injury would be redressed by a favorable decision of this Court. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); Oasis Goodtime Emporium I, Inc. v. City of Doraville, 297 Ga. 513, 518 n.9 (2015), citing Granite State Outdoor Advert., Inc. v. City of Roswell, 283 Ga. 417, 418 (2008) (Georgia courts look to Lujan in assessing standing under Georgia law). GDOT cited no authority depriving this Court of jurisdiction to hear Petitioner's equal protection claim under the facts of this case. See Fulton County v. Action Outdoor Advert., JV, LLC, 289 Ga. 347, 350 (2011) (no authority for proposition that only applicants with ownership or formal leasehold interests in land may obtained vested rights in outdoor advertising permit upon filing of proper application).

11.

The purpose of the Equal Protection Clause is "to secure each and every person against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). With this purpose in mind, the United States Supreme Court expressly recognized "class of one" equal protection claims in Village of Willowbrook v. Olech. Id. To establish a class of one claim, the Court held, the claimant must demonstrate that he or she was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Id.; see Lewis v. Chatham County Bd. of Comm'rs, 298 Ga. 73 (2015) ("Whether it regards a class of one or a class of thousands, an equal protection challenge without similarly situated classes must fail.").

12.

This case involves the alleged unequal application of a facially-neutral statute. Although, it is well settled under federal law that class of one equal protection claims may rest on an agency's unequal application of a facially neutral statute, Petitioner has the burden of establishing that the agency "unequally applied the facially neutral statute *for the purpose of discriminating* against [him]."[20] Strickland v. Alderman, 74 F.3d 260 (11th Cir. 1996) (emphasis added); see Kendrick v. Carlson, 995 F.2d 1440, 1447 (8th Cir. 1993) ("[A] plaintiff asserting an equal protection violation based on unequal application of a facially neutral statute must show intentional discrimination . . . ."); E & T Realty v. Strickland, 830 F.2d 1107, 1114 (11th Cir. 1987) ("The requirement of intentional discrimination prevents plaintiffs from bootstrapping all

[20] The Court is not convinced that Petitioner must demonstrate "vindictive motivation" or "ill will" on the part of the agency, as argued by GDOT in its post-hearing brief, in order to establish an equal protection claim in this case. GDOT failed to cite to any controlling authority to support this contention, and the Court is not aware of any.

misapplications of state law into equal protection claims."). Petitioner failed to demonstrate that the purportedly differential treatment at issue was purposeful.

13.

Although Petitioner characterized GDOT's refusal to grant him a permit as an arbitrary and discriminatory shift in its policy, the only evidence he presented in support of this argument was the mere fact that GDOT had, in the past, granted permits to applicants for signs that were, ostensibly, violative of the 500-Foot Rule. As an initial matter, however, there is insufficient reliable evidence in the record to show that GDOT was aware of the existence of potentially disqualifying signs when it issued the other permits, or that GDOT knew about (i) the disqualifying signs' proximity to the proposed sign, (ii) the visibility of the disqualifying sign from the interstate highway, or (iii) the presence or absence of buildings or other obstructions between the two signs. Rather, based on the testimony presented at the hearing, it is more likely than not that GDOT's issuance of permits for these other signs was attributable to erroneous application or mistaken interpretation of the 500-Foot Rule by various outdoor advertising managers over the course of several decades, rather than a conscious shift in its policy. Sioux City Bridge Co. v. Dakota Cty, 260 U.S. 441 * (1923) ("mere errors of judgment do not support a claim of discrimination . . . there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity.") (cited in Village of Willowbrook, 528 U.S. at 564); see also Apothecary Dev. Corp. v. City of Marco Island, 517 Fed. App'x. 890, 892 (11th Cir. 2013).

14.

Moreover, the fact that an agency erroneously applied a facially-neutral law in the past does not render its current, correct application of the law an equal protection violation, even

where the correct application results in disparate treatment. See Cernuda v. Neufeld, 307 Fed. App'x. 427 (11th Cir. 2009) ("The fact that administrators in certain areas may have made errors in the application of the regulations does not mean that the correct evaluation made in [plaintiff's] case violates the Equal Protection Clause."). If an equal protection violation could be demonstrated through evidence of differential outcome alone, erroneous application of the statute would effectively foreclose the agency from correcting its mistakes. See Kendrick, 995 F.2d at 1447; Seven Star v. United States, 873 F.2d 225, 227 (9th Cir. 1989) ("[E]qual protection principles should not provide any basis for holding that an erroneous application of the law in an earlier case must be repeated in a later one.").

15.

Finally, Petitioner failed to show that GDOT's denial of his application lacked a rational basis. Roma Outdoor Creations, Inc. v. City of Cumming, 599 F. Supp. 2d 1332, 1343 (N.D. Ga. 2009) ("[T]he burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis . . . ." (quoting Board of Trustees v. Garrett, 531 U.S. 356, 367 (2001)). Even assuming that the comparators cited by Petitioner could be considered similarly situated in all relevant respects,[21] GDOT's erroneous application of the 500-Foot Rule in granting the comparators' permit applications in the past would nonetheless constitute a rational basis for its disparate treatment of Petitioner now. Roma Outdoor Creations, Inc., 599 F. Supp. 2d at 1344 (noting that the Eleventh Circuit recognizes an agency's mistaken issuance of

[21] As Petitioner's equal protection claim does not turn on whether the comparators he cited were similarly situated, the Court will not engage in an in-depth review of each comparator. However, the Court notes that in order to demonstrate that these comparators were similarly situated, Petitioner had the burden of showing that they were identical in all relevant respects. Grider v. City of Auburn, 618 F.3d 1240, 1264 (11th Cir. 2010). That is, Petitioner was required to show (1) that each comparator applied for a permit with GDOT, (2) that the comparator's proposed sign was within 660 feet of an interstate highway, (3) that. at the time the permit was issued, there was another sign within 500 feet on the same side of the highway, and (4) both sign faces were visible from the interstate highway. The Court cannot find by a preponderance of evidence that Petitioner was identical to his proffered comparators in

permits as a "perfectly rational basis" for its subsequent denial of such permits); see also Sapp Signs, LLC v. City of Buford, Civil Action File No. 1:11-CV-2498-TWT, 2012 LEXIS 93752, at *8-9 (N.D. Ga. July 5, 2012). In this case, GDOT's application of the 500-Foot Rule to Permit C0239 and Petitioner's Proposed Sign was consistent with the "clear legislative proscription" discussed in Turner in 1976. The Court concludes that GDOT has articulated a clear rational basis for its current action, notwithstanding its mistaken or possibly arbitrary failure to apply the 500-Foot Rule properly in the five previous comparator cases.

III. DECISION

In accordance with the foregoing findings of fact and conclusions of law, GDOT's denial of Petitioner's permit application is **AFFIRMED**.

SO ORDERED this 25th day of August, 2017.

KIMBERLY W. SCHROER
Administrative Law Judge

all relevant respects, especially in instances where Petitioner insufficiently corroborated the accuracy of the measurements of the distance between the signs or their proximity to the highway.