7-12-01

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DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida

AP

DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

CAFÉ EROTICA OF FLORIDA, INC., d/b/a CAFÉ EROTICA, and CAFÉ EROTICA/WE DARE TO BARE/ADULT TOYS/GREAT FOOD/EXIT 94, INC.,

Respondents.
_____/

DOAH CASE NOS.: 00-4188T
00-4189T
00-4423T
00-4424T

DOT CASE NOS.: 00-172
00-171
00-180
00-181

EJD-CLOS

FINAL ORDER

This proceeding was initiated by the filing of requests for a formal administrative hearing on September 29, 2000, and October 13, 2000, by **Respondents, CAFÉ EROTICA OF FLORIDA INC., d/b/a CAFÉ EROTICA** (hereinafter **CAFÉ EROTICA**), and **CAFÉ EROTICA/WE DARE TO BARE/ADULT TOYS/GREAT FOOD/EXIT 94, INC.** (hereinafter **EXIT 94**), pursuant to Section 120.57(1), Florida Statutes, in response to four Notices of Violation--Maintenance of Nonconforming Sign issued by the **Petitioner, DEPARTMENT OF TRANSPORTATION** (hereinafter **DEPARTMENT**). On October 10, 2000, and October 27, 2000, the matters were referred to the Division of Administrative Hearings (hereinafter DOAH) for assignment of an Administrative Law Judge and a formal hearing. On November 27, 2000, DOAH issued an order consolidating the cases.

A formal administrative hearing was held in Gainesville, Florida, on March 7, 2001, before the Honorable Ella Jane P. Davis, a duly appointed Administrative Law Judge. Appearances on behalf of the parties were as follows:

For Petitioner: Jodi B. Jennings, Esquire
Assistant General Counsel
Department of Transportation
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

For Respondents: Gary S. Edinger, Esquire
305 Northeast First Street
Gainesville, Florida 32601

At the hearing, the **DEPARTMENT** presented the testimony of Tom Simmons, Donald Cerlanek, and Juanice Hagan. Joint Exhibits 1 through 5 and Petitioner's Exhibits 6 through 12, 15 through 18, and 20 through 26 were admitted into evidence as offered. Petitioner's Exhibits 13, 14, and 19 were withdrawn. **CAFÉ EROTICA** presented the testimony of Jerry Sullivan, William Harry, Russell Market, and Patricia Doorbar. Respondents' Exhibits 1a through 1cc, and 2 through 6 were admitted into evidence. On May 22, 2001, the **DEPARTMENT** filed a Proposed Recommended Order, and **CAFÉ EROTICA** filed a Proposed Final Order. On July 12, 2001, Judge Davis issued her Recommended Order. On July 27, 2001, the **DEPARTMENT** filed its exceptions to the Recommended Order.

STATEMENT OF THE ISSUE

As stated by the Administrative Law Judge in her Recommended Order, the issue presented was: "Are the four notices of violation against Respondents valid, and if valid, may the Department of Transportation require that the allegedly offending signs be removed?"

BACKGROUND

On or about September 21, 2000, the **DEPARTMENT** became aware that two trucks bearing messages were parked on privately owned property adjacent to the **DEPARTMENT'S** right of way on the west side of Interstate 95 (I-95) in St. Johns County, Florida, in such a manner that the messages on the trucks were visible from the main-traveled way of I-95.

On September 21, 2000, Notice of Violation No. 10B TS 2000 539 was issued to **CAFÉ EROTICA** regarding the truck located adjacent to I-95, 2.015 miles north of S.R. 207, at milepost 15.823, alleging that the truck was an unpermitted sign in violation of Chapter 479, Florida Statutes.

On September 21, 2000, Notice of Violation No. 10B TS 2000 540 was issued to **CAFÉ EROTICA** regarding the truck located adjacent to I-95, 2.041 miles north of S.R. 207, at milepost 15.849, alleging that the truck was an unpermitted sign in violation of Chapter 479, Florida Statutes.

On October 10, 2000, Notice of Violation No. 10B BB 2000 539 was issued to **EXIT 94**, in care of Gary Edinger, the registered agent for the corporation, regarding the truck located adjacent to I-95, 2.015 miles north of S.R. 207, alleging that the truck was an unpermitted sign in violation of Chapter 479, Florida Statutes.

On October 10, 2000, Notice of Violation No. 10B BB 2000 540 was issued to **EXIT 94**, in care of Gary Edinger, the registered agent for the corporation, regarding the truck located adjacent to I-95, 2.041 miles north of S.R. 207, alleging that the truck was an unpermitted sign in violation of Chapter 479, Florida Statutes.

On October 24, 2000, the **DEPARTMENT** issued a letter to **EXIT 94** advising it that

the trucks which were issued the above-referenced notices of violation were moved temporarily out of view and then returned to visibility at each other's previous milepost location. The letter advised that notwithstanding the movement of the trucks within their general location, the trucks remained illegal pursuant to Chapter 479, Florida Statutes.

At the time the notices of violation were issued, the trucks displayed the words "Café Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc." The trucks were intentionally placed within 15 feet of the right of way fence and were parked on raised mounds of dirt, elevating them above the surrounding terrain, making them more visible from I-95. Immediately adjacent to the trucks were light fixtures with halogen lights aimed at the messages on the sides of the trucks. If electricity had been available, the lights would have illuminated the vehicles.

As of January 5, 2001, an additional message was added to the trucks which states, "Hunt & Fish Camp."

EXIT 94 claimed the trucks were not signs and, alternatively, if they were signs, they were exempt as on premises signs pursuant to Section 479.16, Florida Statutes.

EXCEPTIONS TO RECOMMENDED ORDER

The **DEPARTMENT'S** first exception is to that portion of Finding of Fact No. 19 which provides, "[t]he real property owned by Exit 94, Inc., which is the subject of DOT's notices of violation is approximately seven miles from the Café Erotica restaurant," because it is not based on competent, substantial evidence. The basis for the **DEPARTMENT'S** exception is the fact that the subject of the notices of violation is the trucks, not the property on which they are located.

Review of the record reveals that the **DEPARTMENT'S** exception is well taken. There is nothing in the record to support a finding that the property itself is the subject of the **DEPARTMENT'S** notices of violation; the notices were issued to the trucks parked on the property.

The **DEPARTMENT'S** first exception is accepted and Finding of Fact No. 19 is amended by deleting from the second sentence thereof, the words: "which is the subject of DOT's notices of violation."

The **DEPARTMENT'S** second exception is to that portion of Finding of Fact No. 27 which provides: "and no citizen testified that the trucks had caused him/her to patronize the Café Erotica," because it constitutes a departure from the essential requirements of law. The **DEPARTMENT** argues that Chapter 479, Florida Statutes, does not require the **DEPARTMENT** to prove that a citizen has patronized an advertised establishment to prove that a sign constitutes outdoor advertising.

Chapter 479, Florida Statutes, provides, in part, that the combination of structure and message placed within an area subject to the regulatory control of the **DEPARTMENT** constitutes outdoor advertising. Whether the advertising actually influences the traveling public by the message presented is not an element in determining whether a structure and message in an area subject to the **DEPARTMENT'S** jurisdiction constitute a sign for regulatory purposes. The Administrative Law Judge is correct that no such evidence was presented on the issue of citizen patronization as a result of the message. The inference behind this finding, however, is that such evidence was required but not forthcoming. Such an inference is erroneous as a matter of law.

The **DEPARTMENT'S** second exception is accepted, to the extent of that portion of Finding of Fact No. 27 which states "and no citizen testified that the trucks had caused him/her to patronize the Café Erotica," was intended to be given weight or carry an inference that such evidence or proof is required by Chapter 479, Florida Statutes.

The **DEPARTMENT'S** third exception is to that portion of Finding of Fact No. 35 which provides, "[a] solar panel pump was installed to put water into the excavation because getting electricity run to the property was prohibitively expensive," because this sentence, in the context of the first sentence, is misleading. The **DEPARTMENT** contends that in the context of the first sentence, this sentence implies that the solar pump was installed eight months prior to hearing when, in fact, the solar pump was installed approximately two to three weeks prior to the hearing. The **DEPARTMENT** requests that this finding of fact be amended to include the installation date of the solar pump.

While less than artfully crafted in light of the record testimony and the preceding sentence, and irrelevant to this proceeding, this ambiguous portion of Finding of Fact No. 35 is harmless.

The **DEPARTMENT'S** third exception is rejected.

The **DEPARTMENT'S** fourth exception is to that portion of Finding of Fact No. 36 which states, "[i]nspection of the subject property by DOT personnel only occurred about two-and-one-half weeks before the disputed fact hearing." The basis for the **DEPARTMENT'S** exception is that this finding mischaracterizes the testimony, is misleading, and is not based on competent, substantial evidence.

In this regard, the **DEPARTMENT** asserts that the record reflects the portion of the

property relevant to this proceeding, which is that part of the property adjacent to I-95 where the trucks are located, was "inspected" numerous times both before and after the notices of violation were issued. The inspection that occurred two and a half weeks before the hearing was simply the most recent inspection of the trucks by **DEPARTMENT** personnel. Although the referenced inspection was the first detailed inspection of the property on which the trucks are situated, limited ability to inspect was reasonable in light of the uncontroverted evidence that there is no access to **EXIT 94's** property along I-95, and no other signs provide direction to gain access to the property. Further, this most recent inspection, which was guided by Bill Harry, who works for Jerry Sullivan, shareholder and president of **EXIT 94**, was performed at the request of the **DEPARTMENT** as detailed in its Request for Entry Upon Land filed on February 2, 2001.

While the objected-to portion of Finding of Fact No. 36 is factually correct, its inference that the timing of the inspection is somehow faulty or improper is not supported by any competent, substantial evidence. Therefore, no inference therefrom is attached to or drawn from Finding of Fact No. 36.

The **DEPARTMENT'S** fourth exception is accepted to the extent that no inferences are drawn from Findings of Fact No. 36.

The **DEPARTMENT'S** fifth exception is to Finding of Fact No. 41, because it is in the nature of an argument rather than a finding of fact. To the extent that this is a "finding" and not argument, the **DEPARTMENT** argues that it misstates the **DEPARTMENT'S** position, is not supported by competent, substantial evidence, and is irrelevant. Finding of Fact No. 41 states: "It cannot be inferred, as urged by DOT, that if a real property owner 'posts' its

property so the owner may subsequently prosecute trespassers and poachers, the owner also cannot charge a fee to customers, invited guests, or business invitees who hunt or fish on its property with its permission." The **DEPARTMENT** argues that it did not present any argument to this effect.

The relevant findings of fact regarding the "posted" notices are located in Findings of Fact No. 39 and 40, which state that both the surrounding timber company land and the **EXIT 94** property are "posted." The **DEPARTMENT** argues that the existence of "posted" signs, which state that hunting is prohibited, is evidence that hunting is not allowed on the property. The "posted" signs, according to the **DEPARTMENT** are a factor leading to a reasonable inference that **EXIT 94** does not operate a bona fide hunt camp.

The **DEPARTMENT'S** argument in this regard does not support rejection of that portion of Finding of Fact No. 41, or the inference suggested.

The **DEPARTMENT'S** fifth exception is rejected.

The **DEPARTMENT'S** sixth exception is to that portion of Finding of Fact No. 54 which states, "[i]n issuing this [occupational] license, the County accepted Exit 94, Inc.'s, designation of its business without further inquiry," because it is not supported by competent, substantial evidence. The **DEPARTMENT** contends that no testimony was offered by **EXIT 94** from any representative of the county, nor is there any other evidence in the record, as to how the county handled or considered the issuance of an occupational license to **EXIT 94**.

The **DEPARTMENT'S** exception in this regard is well taken. There is no competent, substantial evidence regarding the county's handling of **EXIT 94's** application or **EXIT 94's** designation of its business, as a "fish camp," or whether the county made any inquiries in that

regard. Moreover, the record is insufficient to draw such an inference from the limited evidence offered by **EXIT 94** in this regard.

The **DEPARTMENT'S** sixth exception is accepted and Finding of Fact No. 54 is modified by deleting the words "without further inquiry."

The **DEPARTMENT'S** seventh exception is to Finding of Fact No. 56, because there is no competent, substantial evidence that **EXIT 94** sent invoices to any "clients." The **DEPARTMENT** argues that the evidence shows only that **EXIT 94** sent invoices to other companies owned and controlled by Jerry Sullivan, or his wife. There is no evidence in the record that these companies are, in fact, "clients" of the alleged hunt and fish camp.

The only evidence presented by **EXIT 94** regarding the alleged "clients for hunting and fishing privileges on the subject property, [and] corresponding checks in payments" is the testimony of Jerry Sullivan and his testimony regarding Petitioner's Exhibit 17. Exhibit 17 reflects only that invoices for "customer fish camp use" were prepared to various other entities owned and controlled by Mr. Sullivan or his wife. There is no testimony or evidence that anyone other than the corporations owned and controlled by Mr. Sullivan and his wife were sent invoices or paid invoices as "clients" for use of the property as a hunt and fish camp. However, it is not within the **DEPARTMENT'S** authority to rewrite inartfully drawn findings. Heifetz v. Dep't of Business Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985)("Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finding of fact.").

The **DEPARTMENT'S** seventh exception is rejected.

The **DEPARTMENT'S** eighth exception is to Finding of Fact No. 59, because it is not

based on competent, substantial evidence, and because neither the Administrative Law Judge nor the **DEPARTMENT** has the authority to make a finding that "[n]o legitimate reason was demonstrated to pierce the corporate veil of any of Mr. Sullivan's corporations." The **DEPARTMENT** argues that only a court of competent jurisdiction has the authority to pierce a corporate veil. The **DEPARTMENT** contends that at no point in this proceeding did it request that the corporate veil of any of Mr. Sullivan's numerous corporations be pierced. It is the **DEPARTMENT'S** position that the commonality of corporate ownership and control exercised by Jerry Sullivan over **CAFÉ EROTICA** and **EXIT 94** gives rise to a reasonable inference, under the totality of circumstances in this case, that **EXIT 94's** trucks, notwithstanding any other uses they may have, are advertising for the Café Erotica.

The **DEPARTMENT'S** position is well taken. Under Florida law, only a court of law or equity can determine that the legal existence of a corporation can be disregarded. Roberts' Fish Farm v. Spencer, 153 So. 2d 718 (Fla. 1963). The record reveals that the **DEPARTMENT** sought no such relief and, in any event, the Administrative Law Judge was without the authority to grant such relief. As such, that portion of Finding of Fact No. 59 concluding there was no legitimate reason to pierce the corporate veil of any of Mr. Sullivan's corporations must be stricken as beyond the authority of the Administrative Law Judge.

The **DEPARTMENT'S** eighth exception is accepted and Finding of Fact No. 59 is modified accordingly.

The **DEPARTMENT'S** ninth exception is to Finding of Fact No. 62, because it is not based on competent, substantial evidence. The **DEPARTMENT** argues in this exception that the Administrative Law Judge improperly selectively chose from the testimony of Juanice

Hagan who testified, in addition to the specific facts found, that the **DEPARTMENT** has issued at least four notices of violation to trucks other than the trucks at issue in this proceeding and that the reason for the low number of violations issued for truck signs relative to other types of signs is that the **DEPARTMENT** rarely sees trucks being manipulated in the manner at issue in this case.

While the record reveals that the **DEPARTMENT** is correct in its assertion that there is sufficient evidence of other violations having been issued and sufficient reasons for the relatively low number of violations issued to trucks being improperly used to advertise in violation of Chapter 479, Florida Statutes, it cannot be said that it was erroneous for the Administrative Law Judge to fail to include additional facts in this regard. Heifetz, 475 So. 2d at 1281-1282.

The **DEPARTMENT'S** ninth exception is rejected.

The **DEPARTMENT'S** tenth exception is to Finding of Fact No. 63, on the basis that it is irrelevant to the extent that this proceeding is not a rule challenge, and because it conflicts with Findings of Fact No. 64, 65, and 66. Finding of Fact No. 63, to which the **DEPARTMENT** takes exception, states that "DOT has promulgated no rules or policies specifying the factors to be considered when evaluating whether an operational truck constitutes an 'off-premises sign' worthy of a violation notice."

Upon review of the record in its entirety, it is apparent that the Administrative Law Judge was referring to the lack of formal or written rules or policies of the **DEPARTMENT**. This is evident from the uncontradicted testimony regarding the criteria utilized, factors considered, and investigations undertaken when investigating a claim that an operational truck

constitutes an off premises sign. However, there was no showing that the **DEPARTMENT** had a duty to promulgate formal rules or procedures. As such, the finding, while irrelevant, does not conflict with other findings and is harmless. Nevertheless, there is no competent, substantial evidence in this record to support an inference that the result in this case can or should be influenced by this finding.

The **DEPARTMENT'S** tenth exception is accepted to the extent that no inference can be drawn from this finding.

The **DEPARTMENT'S** eleventh exception is to Conclusion of Law No. 69, to the extent that it states that the **DEPARTMENT** should be held to a "clear and convincing" standard of proof.

As support for this conclusion, the Administrative Law Judge relied on the non-final opinion in Chancellor Media Whiteco Outdoor v. Dep't of Transp., 26 Fla. L. Weekly D627 (Fla. 5th DCA March 2, 2001). That opinion was subsequently withdrawn and replaced with an *en banc* opinion, Chancellor Media Whiteco Outdoor v. Dep't of Transp., 26 Fla. L. Weekly D1894 (Fla. 5th DCA July 30, 2001). Chancellor's unauthorized motion for rehearing *en banc* and for certification was denied by the Court on September 26, 2001. Importantly, that portion of the original panel's opinion regarding the standard of proof in a sign permit revocation proceeding is not only not applicable to this proceeding, because this is not a revocation proceeding, but is also not part of the *en banc* opinion. Id. at 1896 n.5. Moreover, the issue of the proper standard of proof was never raised as an issue in this proceeding and never addressed by the parties. Thus, the issue should not be reached by the Administrative Law Judge.

The **DEPARTMENT'S** eleventh exception is accepted, and Conclusion of Law No. 69 is rejected.

The **DEPARTMENT'S** twelfth exception is to Conclusion of Law No. 70, to the extent that in its discussion of why **CAFÉ EROTICA** should be dismissed from the proceeding, it states that **CAFÉ EROTICA** may have incidentally benefitted from the words on the **EXIT 94** trucks.

Neither the proceeding herein, nor the evidence presented was to decide what benefit to **CAFÉ EROTICA** was derived from the placement of **EXIT 94's** trucks, and no evidence was offered in that regard. Importantly, such a finding or conclusion is not required by Chapter 479, Florida Statutes, in determining whether an outdoor advertising sign is subject to its permitting requirements. Whether the advertising actually influences the traveling public by the message presented or benefits the entity being advertised are not elements in determining whether a structure and message in an area subject to the **DEPARTMENT'S** jurisdiction constitute a sign for regulatory purposes. This reading of the plain language of the statute is as reasonable or more reasonable than the conclusion of the Administrative Law Judge. The finding or conclusion in Conclusion of Law No. 70 that "Café Erotica of Florida, Inc., d/b/a Café Erotica, may have incidentally benefitted [sic] by the words on the trucks" must be stricken.

The **DEPARTMENT'S** twelfth exception is accepted and Conclusion of Law No. 70 is modified accordingly.

The **DEPARTMENT'S** thirteenth exception is to Conclusion of Law No. 76 which states that the trucks are not signs because they are neither "structures" nor "erected." The

DEPARTMENT asserts that this conclusion has no basis in the record or in the Administrative Law Judge's findings. The **DEPARTMENT** urges that based upon proper application of Chapter 479, Florida Statutes, to the evidence and the Administrative Law Judge's factual findings, it must be concluded that the subject trucks are signs within the meaning of Chapter 479, Florida Statutes.

In addressing this exception, a careful reading of the following statutes is required:

Section 479.01(17), Florida Statutes:

> **"Sign" means any combination of structure and message in the form of an outdoor advertising sign, display, device, figure**, painting, drawing, message, placard, poster, billboard, advertising structure, advertisement, logo, symbol, **or other form**, whether placed individually or on a V-type, back-to-back, side-to-side, stacked, or double-faced display or automatic changeable facing, **designed, intended, or used to advertise or inform, any part of the advertising message or informative contents of which is visible from any place on the main-traveled way**. (emphasis added);

Section 479.01(6), Florida Statutes:

> **"Erect" means to** construct, build, raise, assemble, **place**, affix, attach, create, paint, draw, **or in any other way bring into being or establish**; but it does not include any of the foregoing activities when performed as an incident to the change of advertising message or customary maintenance or repair of a sign. (emphasis added); and

Section 479.07(1), Florida Statutes:

> Except as provided in ss. 479.105(1)(e) and 479.16, a person may not erect, operate, use or maintain, or cause to be erected, operated, used or maintained, any sign on the State Highway System outside an incorporated area or on any portion of the interstate or federal-aid primary highway system without first obtaining a permit for the sign from the department and paying the annual fee as provided in this section. For purposes of this

> section, "on any portion of the State Highway System or on any portion of the interstate or federal-aid primary system" shall mean a sign located within the controlled area which is visible from any portion of the main-traveled way of such system.

Based on the broad provisions of Chapter 479, Florida Statutes, it must be concluded that a truck is a structure which may constitute a sign when placed in a location subject to the regulatory control of the **DEPARTMENT** and used to display an advertising message. Although Chapter 479, Florida Statutes (2000), does not define the term "structure," other provisions in Florida law support the conclusion that a truck is a structure. For example, Section 806.01, Florida Statutes (2000), defines the crime of arson, and Section 806.01(3), Florida Statutes, defines the term "structure," to which the crime of arson applies, as "any building of any kind, any enclosed area with a roof over it, any real property and appurtenances thereto, any tent or other portable building, and **any vehicle**, vessel, watercraft, or aircraft." (emphasis added) Thus, had the subject trucks been damaged by fire or explosion, the crime of arson as a first or second degree felony under Section 806.01, Florida Statutes (2000), would apply, because the trucks are structures under Florida law.

Based upon a review of the record in its entirety, the non-use and placement of the subject trucks also meet the statutory definition of "erect" in Section 479.01(6), Florida Statutes (2000). Among the statutory words defining "erect," for the purpose of determining whether a structure plus message constitutes a sign requiring a state permit, are to "place" and "in any other way bring into being or establish." § 479.01(6), Fla. Stat. Both the record evidence and the findings of the Administrative Law Judge establish that the trucks were purposefully, deliberately, and intentionally placed and established (Finding of Fact No. 9) in

their location on the property; the trucks are placed in the only portion of **EXIT 94's** property cleared of trees and therefore visible from I-95 (Findings of Fact No. 9 and 50); the trucks are intentionally placed upon mounds of dirt intentionally constructed for the sole purpose of parking the trucks on them and raising them above the surrounding terrain (Finding of Fact No. 9); the trucks are located within 660 feet of the nearest edge of the right of way of I-95 (Finding of Fact No. 8); the trucks can be seen at this location without visual aid by motorists of normal visual acuity traveling on I-95 (Finding of Fact No. 8); and there are halogen lights aimed at the trucks (notwithstanding the fact that there is no electricity on the premises because it is too expensive to run to the property) (Findings of Fact No. 35 and 9). The record evidence and the Administrative Law Judge's findings establish that the subject trucks satisfy the statutory definition of "erect" because they were intentionally placed on the site and deliberately established at that location.

Based upon the record in its entirety, and the law, it must be concluded that the subject trucks constitute signs pursuant to Chapter 479, Florida Statutes, because, as set forth above, they are structures, and because they clearly contain a message. Under Chapter 479, Florida Statutes, a structure plus message constitutes a sign. The Administrative Law Judge made numerous findings regarding the message of Café Erotica and its delivery to the traveling public:

> In the past, Café Erotica has advertised 'we dare to bare,' 'adult toys,' and 'exit 94' on other billboards located adjacent to I-95 in St. Johns County. Café Erotica no longer rents billboards in these locations. (Finding of Fact No. 20);
>
> The advertisements of Café Erotica currently at exit 94 of I-95

include the words, 'private dances,' and 'great food/adult toys[1]. (Finding of Fact No. 21);

The [Café Erotica] advertising is specifically directed at motorists, including truck drivers, on I-95. (Finding of Fact No. 21);

The trucks were intentionally placed at their locations [by **EXIT 94**] (Finding of Fact No. 9);

Ninety percent of the time, the subject trucks are parked on the subject property. (Finding of Fact No. 33);

Jerry Sullivan has decision-making authority for both Respondents as a corporate officer of both corporations. (Finding of Fact. No. 30);

Jerry Sullivan makes management decisions concerning Café Erotica, including whether, and how, to advertise. (Finding of Fact No. 31);

On both trucks, the letters are all capitalized; the size of the letters and the paint colors used call the viewer's attention to the phrases "CAFÉ EROTICA," "WE DARE TO BARE," "ADULT TOYS," "GREAT FOOD" and "EXIT 94." The abbreviation "INC.," is the phrase smallest in size, located at the very bottom right, relatively inconspicuous, and the words, "hunt & fish camp," following, vertical to the rest of the verbiage. There are no addresses, telephone numbers, arrow, or other identifying information. (Finding of Fact No. 11);

Exit 94, Inc., does not sell food or adult toys. (Finding of Fact No. 15); and

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[1]This sign, located at exit 93 on I-95, is a 14' x 25' permanent billboard, and is the subject of another proceeding, Department of Transportation v. Café Erotica/We Dare To Bare/Adult Toys/Great Food/Exit 94, Inc., DOAH Case No. 01-0727T, DOT Case No. 01-022. The Administrative Law Judge in that proceeding, who is the same Administrative Law Judge in this proceeding, issued a Recommended Order concluding that the sign is illegal and unpermitted, and recommended that it be removed. The **DEPARTMENT** entered a Final Order adopting the Recommended Order on October 2, 2001.

> The Café Erotica restaurant is a 24-hour per day, full-service restaurant . . . which sells adult toys [and] is located at 2620 State Road 207 (SR-207), at the intersection of SR 207 and the exit 94 off-ramps from I-95. . . . (Findings of Fact No. 18 and 19)

These findings and the record as a whole lead to the inescapable conclusion that the message announced by the trucks is: "Café Erotica," at which they "DARE TO BARE," where there is "GREAT FOOD" and "ADULT TOYS," and is located at "EXIT 94." In fact, the Administrative Law Judge admits and recognizes that words superfluous to this message are "smallest in size," "located at the very bottom right," "relatively inconspicuous," and written "vertical." (Finding of Fact No. 11) These findings also reveal that any non-sign, non-message related use of the trucks is purely incidental and that the trucks primarily function as signs (See Finding of Fact No. 33).

Section 120.57(1)(l), Florida Statutes (2000), provides, in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. . . .

Thus, an agency is not required to defer to an administrative law judge on issues of law. See State Contracting & Engineering Corp. v. Dep't of Transp., 709 So. 2d 607 (Fla. 1st DCA 1998)(interpretation of a Department rule); Florida Public Employees Council 79, AFSCME v. Daniels, 646 So. 2d 813 (Fla. 1st DCA 1994). An agency also has broad discretion in

interpreting a statute which it administers, deference is accorded an agency in the interpretation of a statute which it administers, and an agency's "interpretation should be upheld when it is within the range of permissible interpretations." Public Employees Relations Comm'n v. Dade County Police Benevolent Assoc., 467 So. 2d 987 (Fla.1985); Board of Podiatric Medicine v. Florida Medical Ass'n, 779 So. 2d 658 (Fla. 1st DCA 2001). As in Florida Medical, the **DEPARTMENT'S** reading and construction of the statute is reasonable and "does not enlarge, modify, or contravene the statute, and is neither arbitrary nor capricious, and is fully supported by competent substantial evidence so as to be a proper exercise of [its] delegated legislative authority." Florida Medical Ass'n, 770 So. 2d at 660. The **DEPARTMENT'S** conclusion of law that the trucks are signs because they meet the statutory definitions of "sign," "erect," and "structure," is as reasonable or more reasonable than the interpretation and conclusion of the Administrative Law Judge.

The **DEPARTMENT'S** thirteenth exception is accepted and Conclusion of Law No. 76 is rejected.

The **DEPARTMENT'S** fourteenth exception is to Conclusions of Law No. 77, 78, and 80, on the basis that they rest on a misapplication of Sun City Shell v. Dep't of Transp., 626 So. 2d 1097 (Fla. 1st DCA 1993).

Sun City Shell is factually inapposite to the instant case. In a short, eleven sentence opinion, the Sun City Shell court found that the undisputed facts established that a parked trailer owned by Sun City Shell, Inc., was a fully operational, 40-foot, over-the-road trailer normally towed by a truck. Id. The trailer was yellow and had the words "Sun City Shell, Inc." painted in large black letters along the side. The trailer in Sun City Shell had no other

markings such as an arrow, address, or phone number. Id. Based upon these facts, the hearing officer found that the trailer was not "designed, intended or used to advertise or inform." The **DEPARTMENT** had concluded that the trailer was a sign and rejected the recommended order. The **DEPARTMENT'S** final order was reversed on appeal. Id.

The only relevant similarity between Sun City Shell and the present case is that the trucks contain the name of a corporation. The present case, however, involves much more than a corporate name on the side of a truck. Present in this case, but not present in Sun City Shell, is the existence of a second corporation, Café Erotica of Florida, Inc.; the fact that its business "Café Erotica," which is related to **EXIT 94** and controlled by Jerry Sullivan, is advertised on the trucks; and the specific finding that the trucks are only incidentally used for hauling, etc., ten percent of the time. The crucial difference between Sun City Shell and this case is the fact that the **EXIT 94** trucks contain words which themselves constitute an advertising message in large colorful letters consisting of the name of an off premises business ("Café Erotica"), the goods and services that business offers (dare to bare/great food/adult toys), and where it is located (exit 94). The advertised services, food, adult toys, and dancers, are not available from **EXIT 94** or at the **EXIT 94** property and are unrelated to the uses **EXIT 94** makes of the trucks (the delivery of corn to and the spreading of corn on the property).

The glaring differences between Sun City Shell and the instant case make Sun City Shell neither applicable to nor dispositive of the issues at hand. The **DEPARTMENT'S** conclusion that Sun City Shell is not dispositive of the present case and that the subject trucks are signs within the meaning of Chapter 479, Florida Statutes, which is a statute over which

the **DEPARTMENT** has substantive jurisdiction, is as reasonable or more reasonable than the interpretation and conclusion of the Administrative Law Judge in this regard.

The statement in Conclusion of Law No. 78 that "Exit 94, Inc., took steps to minimize any incidental value of its corporate name or of its trucks to Café Erotica by painting additional language on the trucks to clearly identify them as belonging to a 'hunt and fish camp'" is belied by both the totality of the record evidence and the Administrative Law Judge's own findings. The Administrative Law Judge determined that there was competent, substantial evidence in the record to find that the word "Inc." on the trucks is not only "relatively inconspicuous," but "smallest in size." (See Finding of Fact No. 11) The words "hunt & fish camp" are also smaller in size, are relatively inconspicuous, and are the only words that run vertical to the Café Erotica message. (See Finding of Fact No. 11) It is clear that the actions were intended to circumvent the law and to minimize any possibility that the traveling public would believe that a fish camp was being advertised. Clearly these actions were to advertise Café Erotica at exit 94 off of I-95. The record is also clear that the trucks are not used for any Café Erotica business. It is also undisputed that the name of the corporate owner of the **EXIT 94** property is not "Café Erotica/We Dare to Bare/Great Food/Adult Toys/Exit 94, Inc., Hunt and Fish Camp." Similarly, there is no evidence that the name of the purported business operated on the **EXIT 94** property is "Café Erotica/We Dare to Bare/Great Food/Adult Toys/Exit 94, Inc., Hunt and Fish Camp." Thus, the Administrative Law Judge's conclusion that **EXIT 94** took steps to minimize any incidental value of its corporate name or of its trucks to Café Erotica is not supported by competent, substantial evidence, by reasonable inference, or the law.

In Conclusion of Law No. 80, the Administrative Law Judge concludes that the **DEPARTMENT'S** efforts in "not checking" other operable trucks and "not citing" them as signs renders the absence of "slashes" in the alleged corporate name on the trucks and the juxtaposition of the phrases immaterial and supports the conclusion that the "trucks should be afforded the protection of the decision in the Shell City Sun, Inc., [sic] case." However, the record is undisputed that the **DEPARTMENT** explained its efforts and difficulties in locating allegedly offending trucks, and those explanations were accepted by the Administrative Law Judge. (See Findings of Fact No. 64, 65, and 66) The Administrative Law Judge also found that the **DEPARTMENT** addresses the issues of trucks being utilized as on premises signs on a case by case analysis, weighing the context of the sign, usage of the truck, location, and length of time the truck is parked, and whether the message advertises the business at the location where the truck is parked, advertises another business, or advertises anything at all. (Finding of Fact No. 64) This reference to the **DEPARTMENT'S** efforts appears to be the Administrative Law Judge's attempt to justify the fact that the name on the trucks does not advertise the name of the corporate entity owning the **EXIT 94** property.

If the legal reason for the Administrative Law Judge's conclusion that **EXIT 94's** trucks are not signs and are not required to have a state permit is because the name thereon is simply the name of the corporate owner of the property on which they sit, then the name must, at the very least, be the name of the corporate owner, not some variation or machination thereof. However, as detailed herein, these findings are immaterial because the law does not provide for an exemption from permitting requirements for a sign simply because it bears a corporate name. Section 479.16, Florida Statutes (2000), exempts signs on the premises of an

establishment when the sign consists "primarily of the name of the establishment," not when the sign consists of the name of the corporate fee owner. Manipulation of a corporate name in the manner and to the extent utilized by **EXIT 94** is material and falls beyond the contemplation of the law and the holding in Sun City Shell. The **DEPARTMENT'S** interpretation and conclusion in this regard are as reasonable or more reasonable than the conclusion of the Administrative Law Judge.

The **DEPARTMENT'S** fourteenth exception is accepted and Conclusions of Law No. 77, 78, and 80 are rejected.

The **DEPARTMENT'S** fifteenth exception is to Conclusion of Law No. 79. The **DEPARTMENT** asserts that the Administrative Law Judge in Conclusion of Law No. 79 assumes, without any basis in fact in the record, that it was the **DEPARTMENT'S** position that the **EXIT 94** name is not a "logical" name for a hunting and fishing camp, and that such a position was neither the **DEPARTMENT'S** position nor relevant to this proceeding. The **DEPARTMENT** claims that its only interest, as articulated in the record, in **EXIT 94's** corporate name is to the extent that the name is being used to advertise in a manner regulated by Chapter 479, Florida Statutes. As acknowledged by the **DEPARTMENT**, placing a corporate name on a vehicle is not prohibited by Chapter 479, Florida Statutes. The record is also clear that the **DEPARTMENT** has at no time sought to regulate the corporate name of **EXIT 94** in any manner not within the scope of its authority. It is the **DEPARTMENT'S** position that because **EXIT 94** is using its corporate name in such a manner as to constitute advertising, such use must comply with the requirements of law governing outdoor advertising.

The **DEPARTMENT** also argues that it did not assert as its position that the corporate

veil of **EXIT 94** must be pierced, or that **EXIT 94** is a "front" for something else. It is the **DEPARTMENT'S** position that **EXIT 94** does not operate a bona fide hunt and fish camp on the premises of its property. However, even if **EXIT 94** was operating a functional hunt and fish camp, it would not alter the fact that **EXIT 94's** trucks are advertising the Café Erotica rather than a hunt and fish camp. Further, as to the advertising message, which may qualify a sign for a permit exemption pursuant to Section 479.16, Florida Statutes, the primary thrust of the advertising on **EXIT 94's** trucks is not the activity on the **EXIT 94** property, but rather the activities at the Café Erotica.

Section 479.16, Florida Statutes, provides that while certain signs do not require permits, they still require compliance with Section 479.11, Florida Statutes. Of importance to this case is Section 479.16(1), Florida Statutes, which provides, in pertinent part:

> Signs erected on the premises of an establishment, which **signs consist primarily of the name of the establishment or which identify the principal or accessory merchandise, services, activities, or entertainment sold, produced, manufactured, or furnished on the premises of the establishment** and which comply with the lighting restrictions under department rule adopted pursuant to s. 479.11(5) . . . If a sign **located on the premises of an establishment consists principally of brand name or trade name advertising and the merchandise or service is only incidental to the principal activity**, or if the owner of the establishment receives rental income from the sign, then the sign is not exempt under this subsection. (emphasis added)

Florida's statute is patterned after and in compliance with 23 C.F.R. 750.709, regulating on-property and on premise advertising, which provides, in pertinent part:

> (a) A sign which **consists solely of the name of the establishment** or which **identifies the establishment's principal or accessory products or services offered on the property** is an

on-property sign. . . .
(d) **Signs are exempt from control** under 23 U.S.C. 131 **if they . . . advertise activities conducted on the property on which they are located**. . . .State laws or regulations shall contain **criteria for determining exemptions**. These criteria may include:
(1) A **property test** for determining whether **a sign is located on the same property as the activity or property advertised**; and
(2) A **purpose test** for determining **whether a sign has as its sole purpose the identification of the activity located on the property or its products or services** . . .
(3) The criteria must be sufficiently specific **to curb attempts to improperly qualify outdoor advertising as "on-property" signs**, such as signs on narrow strips of land contiguous to the advertised activity when the purpose is clearly to circumvent 23 U.S.C. 131. (emphasis added)

There is no evidence in the record that there is an "establishment" on the **EXIT 94** property, or that the name of the "establishment" is the "Café Erotica/We Dare to Bare/Great Food/Adult Toys/Exit 94, Inc., Hunt and Fish Camp." In fact, the evidence establishes and the Administrative Law Judge finds there is not such an establishment. Mr. Sullivan admits, in fact, that Café Erotica/We Dare to Bare/Great Food/Adult Toys/Exit 94, Inc., is not the name of the corporate entity owning the property or the name of **EXIT 94**'s purported business. In order to qualify as an on premises sign, the words on the subject trucks must "consist primarily of the name of the establishment," i.e., hunt and fish camp. Alternatively, the on premises sign of an "establishment" can "identify the principal or accessory merchandise, services, activities, or entertainment sold, produced, manufactured, or furnished on the premises of the establishment." In this case, the services of **EXIT 94** are, allegedly, "hunt" and "fish," the very words that are smaller and inconspicuously the only vertically placed words on the subject trucks. (See Petitioner's Exhibits 6 and 7) The principal or accessory

merchandise, service, activity, or entertainment on the **EXIT 94** property is not a "café," it is not anyone who might "dare to bare," it is not "great food," and it is not "adult toys." None of those goods or services are produced on the **EXIT 94** property, nor can they be obtained from the **EXIT 94** property or the hunt and fish camp. Rather, each of those things can be obtained from Café Erotica, which, not coincidentally, is located at exit 94.

Statutory compliance is not a game in which the law and the result can be manipulated to avoid its meaning and intent. In light of the totality of the facts in this record, it is clear that the size, configuration, colors, and placement of the words on the trucks is to emphasize, draw attention to, and inform people of the name, products, services, and location of Café Erotica. The minimal acknowledgment of the activity, service, or product, if any, of a "hunt & fish camp," is placed there solely in an attempt to defeat the letter of the statutory advertising prohibitions. Moreover, that minimal information was added only after the notices of violation were issued. Federal regulations are clear that a determination of whether a sign is exempt from permitting requirements as an on premises sign requires both a determination that it is located on the same property as the activity or property advertised, and that the sign has as its sole purpose the identification of the activity located on the property or its products or services. 23 C.F.R. 750.709(d)(1),(2). However, the analysis does not end there. Federal regulation also requires that the criteria must be satisfied to the extent that the sign's use does not improperly qualify outdoor advertising as "on-property" signs.

Neither the spirit nor the intent of the law is satisfied when: 1) the words of an advertising scheme of an existing business are utilized to create the name of a new corporation; 2) the size, shape, configuration, color, and placement of the words in the property owner's

name are deliberately manipulated to emphasize the name of an off premises business, its services, and its location; 3) the alleged new business or establishment on the property where the sign is located cannot be accessed without trespassing on private property; 4) the only alleged customers of the alleged new business are corporate entities owned and controlled by the same person (or his spouse) who owns and controls the existing off premises business; and 5) any words identifying the actual or purported on premises business are relatively small and inconspicuous compared to the words which relate to the off premises business activity.

As detailed above, a truck is a structure, placement of a truck constitutes being erected for purposes of Chapter 479, Florida Statutes, and the words on the subject trucks constitute a message. Thus, the trucks satisfy the statutory definition of a "sign" under Chapter 479, Florida Statutes, as readily as a traditional billboard and clearly function as such. However, it is of no consequence to the legal issue herein that the advertising message is on a truck. Consider, for example, if hypothetically the property were owned by McDonald's, on the property is a traditional billboard with golden arches and the word "McDonald's" in large, bright, conspicuous letters. McDonald's is issued a notice of violation for having an unpermitted sign. McDonald's responds that the name of the corporate entity owning the property is McDonald's, and that McDonald's has a hunt and fish camp on the property, but nothing more. McDonald's then adds in smaller, inconspicuous letters the words "hunt & fish camp," and claims the sign is exempt because it is now an on premises sign.

There can be no doubt that even if there is an establishment on the site, i.e., a hunt and fish camp, the message conveyed is to advertise "McDonald's" fast food restaurant. The message is "McDonald's" and McDonald's is "designed, intended, or used to advertise or

inform, [and] . . . the advertising message or informative contents . . . is visible from any place on the main-traveled way," as contemplated by Section 479.01(17), Florida Statutes (2000). Similarly, the message on **EXIT 94's** trucks is Café Erotica at exit 94, and the message provides the traveling public with the details of what it offers and where it is located.

Neither the record evidence nor the law support the Administrative Law Judge's conclusions that the trucks are not signs, that the signs are exempt, or that Sun City Shell supports **EXIT 94's** position. The **DEPARTMENT'S** interpretations and conclusions in this regard are as reasonable and in fact more reasonable given the totality of the circumstances than the interpretations and conclusions of the Administrative Law Judge.

The **DEPARTMENT'S** fifteenth exception is accepted and Conclusion of Law No. 79 is rejected.

The **DEPARTMENT'S** sixteenth exception is also to Conclusion of Law No. 80, on the additional basis that it presumes facts not found and presumes that the **DEPARTMENT** is held to a legal standard which does not exist. Conclusion of Law No. 80 states that the **DEPARTMENT** has a pattern of not checking to determine the owners of trucks and not citing operable trucks as signs. The **DEPARTMENT** argues that no competent, substantial evidence was presented that the **DEPARTMENT** has any such "pattern" of behavior, nor are there any findings of fact which would support this conclusion. In fact, the **DEPARTMENT** continues, this conclusion is in direct conflict with Findings of Fact No. 65 and 66, and ignores the fact the **DEPARTMENT** does regulate trucks as signs when they are used in a manner subject to the **DEPARTMENT'S** regulatory control. Furthermore, the **DEPARTMENT** argues, that the Administrative Law Judge in this conclusion ignores Section 479.105(1)(a), Florida Statutes,

which provides an alternative notice procedure to mailing and allows the **DEPARTMENT** to post notices on sign faces when sign owners are not readily identifiable.

No authority was offered by **EXIT 94** or the Administrative Law Judge for the proposition that the **DEPARTMENT** has the duty to check "who are the corporate owners of operable trucks [being utilized] . . . as, [a] 'sign'." The law does not support that conclusion because checking such records is unnecessary in light of the **DEPARTMENT'S** authority in Section 479.105(1)(a), Florida Statutes (2000), to "prominently post on the sign face a notice stating that the sign is illegal and must be removed within 30 days . . . ." The Administrative Law Judge acknowledges in Finding of Fact No. 64 that "[i]n the normal course of business DOT inspectors determine whether trucks constitute 'on-premises signs' on a case-by-case analysis;" acknowledges at Finding of Fact No. 65 that "DOT representatives gave reasonable explanations why the [other] truck owners had not been notified of violations;" and at Finding of Fact No. 66, acknowledges that the trucks Mr. Sullivan brought to the **DEPARTMENT'S** attention were "personally evaluated" and "DOT district personnel [directed] to take either further investigative or regulatory action as . . . instructed on a case-by-case basis." The conclusion in Conclusion of Law No. 80 that there was established a pattern of not checking and not citing other trucks utilized as signs, is not supported by competent, substantial evidence, the findings and conclusions of the Administrative Law Judge, or the law. Accordingly, the conclusion that the trucks should be "afforded the protection of the decision in the Shell City Sun, Inc. [sic] case" is not supported by the record or the law.

The **DEPARTMENT'S** sixteenth exception is accepted.

The **DEPARTMENT'S** seventeenth exception is to Conclusion of Law No. 81, because

it does not conclude that the trucks are signs.

As detailed above regarding Conclusions of Law No. 76, 77, and 78, the trucks as utilized by **EXIT 94** are signs for the purposes of Chapter 479, Florida Statutes (2000), and they are not exempt therefrom as on premises signs. In the single sentence of Conclusion of Law No. 81, the Administrative Law Judge concludes that even if the trucks are signs, they are exempt as on premises signs under Section 479.16(1), Florida Statutes.

An agency is not required to defer to the administrative law judge on issues of law. See State Contracting & Engineering Corp., 709 So. 2d at 609; Daniels, 646 So. 2d at 816. An agency has the principal responsibility of interpreting statutes dealing with matters within its regulatory jurisdiction and expertise. Daniels, 646 So. 2d at 816; Dade County Police Benevolent Ass'n, 467 So. 2d at 989. Therefore, the **DEPARTMENT** has the authority, indeed the responsibility, to overrule improper or incorrect statutory interpretations and applications of administrative law judges regarding Chapter 479, Florida Statutes. Moreover, an agency's interpretation of a statute which it administers "should be upheld when it is within the range of permissible interpretations." Dade County Police Benevolent Assoc., 467 So. 2d at 989. As in Florida Medical, the **DEPARTMENT'S** reading and construction of the statute is proper as it "does not enlarge, modify, or contravene the statute, and is neither arbitrary nor capricious, and is fully supported by competent substantial evidence so as to be a proper exercise of [its] delegated legislative authority." Florida Medical Ass'n, 770 So. 2d at 660. The **DEPARTMENT'S** interpretation and conclusion are fully supported by both the language and intent of the law and is also as reasonable or more reasonable than the conclusion of the Administrative Law Judge.

The **DEPARTMENT'S** seventeenth exception is accepted and Conclusion of Law No. 81 is rejected.

The **DEPARTMENT'S** eighteenth exception is to Conclusion of Law No. 84, because it ignores the plain meaning of Section 479.16(1), Florida Statutes, and erroneously concludes that the trucks qualify for an on premises sign exemption. In its exception, the **DEPARTMENT** argues that, based on the Administrative Law Judge's findings of fact, the most reasonable conclusion to be drawn from those facts regarding the purported hunt and fish camp is that there is no bona fide hunt and fish camp on the premises of the **EXIT 94** property, and, therefore, the trucks do not meet the exemption for on premises signs. The **DEPARTMENT** contends that Findings of Fact No. 35-40, 42, 44-53, 56-57, and 60, and particularly Findings of Fact No. 36 and 44, support this conclusion.

According to the Administrative Law Judge, the trucks are not signs, but that if they are signs, they are exempt under Section 479.16(1), Florida Statutes, which provides, in pertinent part:

> The following signs are exempt from the requirement that a permit be obtained under the provisions of this chapter but are required to comply with the provisions of s. 479.11(4)-(8):
>
> (1) **Signs erected on the premises of an establishment**, which signs **consist primarily of the name of the establishment or which identify the principal or accessory merchandise, services, activities, or entertainment sold, produced, manufactured, or furnished on the premises of the establishment** and which comply with the lighting restrictions under department rule adopted pursuant to s. 479.11(5), ... (emphasis added)

However, there is no evidence of "an establishment" on the **EXIT 94** property, and no such finding was made by the Administrative Law Judge. "Establishment" is both commonly

and legally defined as a "place of business." See § 877.21(2), Fla. Stat. ("Establishment" means a privately owned place of business to which the public is invited . . . .") and BLACK'S LAW DICTIONARY 490 (5th ed. 1979)("Establishment. Place of business.") In fact, the Administrative Law Judge specifically found there was no "establishment" when she found "There were no utilities, restrooms, offices, or facilities to clean game on the premises. No fishing equipment was available for purchase. . . ." (Finding of Fact No. 36) In addition, the Administrative Law Judge specifically found that "Exit 94, Inc., lists addresses and locations other than the subject property as its business address(es) for various purposes. It maintains no office or telephone on the subject property. The only building on the subject property is a very small storage shed . . . ." (Finding of Fact No. 44).

Jerry Sullivan, the owner of both **EXIT 94** and Café Erotica, testified that he is "trying . . . to have a hunting and fishing camp. . . [and the property] is intended for a hunt and fish camp." (T1. 185)[2] The record in general and Finding of Fact No. 11 specifically reveal that the size, capitalization, placement, and color of certain words and phrases on the trucks are used to call "the viewer's attention to the phrases, 'CAFÉ EROTICA,' ' WE DARE TO BARE,' 'ADULT TOYS,' 'GREAT FOOD,' and 'EXIT 94.'" However, the merchandise or activity sold or produced on the property, e.g., "hunt" and "fish," are smaller in size and inconspicuous in location. (Finding of Fact No. 11) In fact, the words "hunt & fish camp" were not added until January 5, 2001, barely one month prior to the hearing. (See Finding of Fact No. 10) This is not the logical language emphasis if in fact someone were truly intent on

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[2]References to the transcript of the proceeding will be in the form of (T.) followed by the volume number and the appropriate page number(s).

promoting hunting and fishing activities on the property.

As detailed above, the purported hunt and fish camp is not accessible from I-95, and there are no improvements to the **EXIT 94** property visible from I-95. (Findings of Fact No. 26 and 37) However, even if a motorist exited at exit 94, he or she would be hard pressed to find the hunt and fish camp because the property has only one entrance which is not visible from or directly accessible from a public road (Finding of Fact No. 37); there are approximately nine and one half miles between I-95's exit 94 and the private access road leading to **EXIT 94**'s property (Finding of Fact No. 42); and along those nine and one half miles there are no signs providing directions or otherwise advertising the existence of a "hunt and fish camp." (See Finding of Fact No. 42) Only after one trespasses on "posted" property and on "a private dirt road created and owned by Georgia-Pacific Timber Company, and then drives approximately one mile along that dirt road over the timber company's land" is there a sign indicating the existence of a hunt and fish camp. (Finding of Fact No. 37)

The record establishes, and the Administrative Law Judge acknowledges by her findings, that the hunt and fish camp currently is not operational. Jerry Sullivan "anticipates creating, maintaining and charging people for the privilege of using the subject property as a hunting and fishing camp" (Finding of Fact No. 32); he "intends" to reward employees and clients of his various enterprises with free privileges at the camp (Finding of Fact No. 32); and he "intends" to stock the currently non-functional fish pond with fish (Finding of Fact No. 53). The actual use of the property for the stated business purpose, i.e., hunting and fishing, has been limited to minor incidental hunting by Jerry Sullivan and one of his employees. (Findings of Fact No. 48 and 49) If the intended and actual use of the **EXIT 94** property is a benefit or

reward to be given to employees and clients, advertising is unnecessary.

Although cited by the Administrative Law Judge as support of her conclusion, Roadmaster Inn Services Corp. v. Dep't of Transp., 621 So. 2d 435 (Fla. 1st DCA 1993), supports the **DEPARTMENT'S** position in this case. Roadmaster dealt with the construction of a former, but similar, version of Section 479.16(1), Florida Statutes, in the context of a somewhat different factual situation, but similar legal theories. Roadmaster's theory of its case was that the printed message on its sign merely reflected the name of the entity engaged in providing services on the premises of the sign, and that the corporation was entitled to the on premises exemption. (See Roadmaster Final Order, Finding of Fact No. 8)[3] The **DEPARTMENT** took the position that there was no legitimate business activity being conducted on the premises, and that the sign was actually being used to promote the business across the street. (Roadmaster Final Order, Finding of Fact No. 11)

The **DEPARTMENT** concluded in Roadmaster that Section 479.16(1), Florida Statutes, requires that in order to meet the definition of "establishment," the business establishment must "be an ongoing business at least in the sense of a minimal level of meaningful activity customary for that particular kind of business such that the business establishment exists in substance rather than merely in form." (Roadmaster Final Order, Conclusion of Law No. 3) In Roadmaster, there was evidence of some business activity on the premises. However, as concluded in Roadmaster, and as the **DEPARTMENT** urges that the Administrative Law Judge concluded and record establishes that "[t]he more persuasive and

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[3]Department of Transp. v. Florida Roadmaster Inn Services Corp., DOAH Case No. 91-4785T (June 1, 1992).

credible evidence supports a conclusion that there were no meaningful or legitimate business activities being conducted on the premises where the sign is located . . . when the notice to show cause was issued, or from that day forward to the date of the hearing. . . ." (Roadmaster Final Order, Conclusion of Law No. 5) Further, the **DEPARTMENT** argued that "the corporation has never had any meaningful business activities on the questioned premises since the corporation was formed almost two years ago." (Roadmaster Final Order, Conclusion of Law No. 7)

Likewise, there is no meaningful business activity on the **EXIT 94** property, and there is no evidence of a place of business, i.e., an "establishment." The purpose of the on premises exemption is to allow on premises signs to advertise for legitimate ongoing business operations. The on premises exemption exists for the benefit of on site businesses; it was not created to provide an opportunity to avoid applicable permitting requirements.

The answers to the legal issues raised by the petitions in this case are found in Florida and federal law. Federal law specifically charges the State of Florida with the responsibility to curb attempts to improperly qualify outdoor advertising as "on-property" signs. Contrary to the comments at endnote 1 of the Administrative Law Judge's recommended order, the **DEPARTMENT** has not asserted that 23 U.S.C. 131 and 23 C.F.R. 750.704 and 750.709 permit "piercing the corporate veil." As detailed above, the basis of Florida's on premises sign exemption is 23 U.S.C. 131, which includes among the types of signs allowed to be located within controlled areas adjacent to interstate and federal-aid primary systems, "(3) signs, displays and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, **advertising activities conducted on the property on**

which they are located . . . ." (emphasis added) See also 23 C.F.R. 750.704. The **EXIT 94** trucks do not advertise a place of business or activities conducted on the **EXIT 94** property. Regulation of on-property or on premise advertising is found in 23 C.F.R. 750.709 which provides, in pertinent part:

> (a) A sign which consists solely of the name of the establishment or which identifies the establishment's principal or accessory products or services offered on the property is an on-property sign . . . .
> (d) Signs are exempt from control under 23 U.S.C. 131 if they . . . advertise activities conducted on the property on which they are located . . . State laws or regulations shall contain criteria for determining exemptions. These criteria may include:
> (1) A property test for determining whether a sign is located on the same property as the activity or property advertised; and
> (2) A purpose test for determining whether a sign has as its sole purpose the identification of the activity located on the property or its products or services . . .
> (3) The criteria must be sufficiently specific to curb attempts to improperly qualify outdoor advertising as "on-property" signs, such as signs on narrow strips of land contiguous to the advertised activity when the purpose is clearly to circumvent 23 USC 131.

Section 479.16(1), Florida Statutes (2000), is the test required by this provision, which requires, among other things, that in order to be exempt a bona fide business establishment must exist on the premises where the sign is located.

As noted above, the term "establishment" commonly and legally means a place of business. See BLACK'S LAW DICTIONARY 490 (5th ed. 1979) ("Establishment. Place of business."). In the context of the present case, to be entitled to an exception, the trucks would have to be located at an "establishment" and their messages would have to be confined to the advertisement of "activities conducted on the property" or the " products or services" of that

establishment. The trucks do not meet the criteria for an exemption because there is no business, no "establishment," and there are no bona fide activities conducted or services offered on the premises. Even if bona fide business activities or services were offered on the **EXIT 94** property, it is not those services that are depicted or advertised on the trucks. As a result, the **EXIT 94** property does not meet the statutory definition of an establishment and its trucks do not contain a message regarding any services or activities of **EXIT 94** or a hunt and fish camp. The **DEPARTMENT'S** position is further supported by the facts enumerated above in response to the **DEPARTMENT'S** thirteenth and eighteenth exceptions.

The Administrative Law Judge describes **EXIT 94's** efforts at having a hunt and fish camp as having "a great deal more to do." (Conclusion of Law No. 84) Evidence of any meaningful business activity relating to hunting and fishing on the **EXIT 94** property is non-existent. (See Findings of Fact No. 36, 44, 50, and 51) In fact, the Administrative Law Judge finds and the record supports the findings that only eight months prior to the hearing **EXIT 94** dug a pond on the property, and just barely one month prior to the hearing, the words "Hunt & Fish Camp" were added to the trucks, albeit in smaller letters and in an inconspicious location and manner. (See Findings of Fact No. 35, 10, and 11) The property, as admitted by Mr. Sullivan, is in a state of "being developed." The property is not open to the public and is inaccessible without committing trespass. There are no utilities, no parking lot, no office, and no telephone on the property. (See Findings of Fact No. 36, 44, and 50) In addition, **EXIT 94** "lists addresses and locations other than the subject property as its business address(es) for various purposes" (Finding of Fact No. 44), and the primary and most visible advertising on the site is for another business enterprise at a different location.

It was **EXIT 94's** burden to prove that the signs, i.e., the trucks, satisfy the criteria for an exemption as being on premises by a preponderance of the evidence. While **EXIT 94** presented evidence that it has performed tasks on the **EXIT 94** property toward developing a hunt and fish camp, absolutely no evidence was presented to establish the minimal level of meaningful activity that even lay people would consider to be customary for any business, let alone a hunt and fish camp, or that **EXIT 94's** activities constituted a minimal level of meaningful activity. **EXIT 94** failed to meet its burden of proof.

The **DEPARTMENT'S** conclusion that the subject trucks do not meet state or federal criteria to qualify as on premises signs is as reasonable or more reasonable than the contrary conclusion of the Administrative Law Judge.

The **DEPARTMENT'S** eighteenth exception is accepted and Conclusion of Law No. 84 is rejected.

The **DEPARTMENT'S** nineteenth exception is to that portion in Conclusion of Law No. 85, which states that if the **EXIT 94** property was a strip mall and the trucks were parked in its concrete parking lot, then the trucks would qualify for the on premises exemption. The **DEPARTMENT** takes exception because the conclusion creates a set of speculative facts, which are different from and not based on the facts found in this case, draws a conclusion therefrom, and is wholly irrelevant to the issues in this case. The **DEPARTMENT** also takes exception to Conclusion of Law No. 85 because there was no evidence presented in this case, and there is no factual finding, that the hunt and fish camp is a rural use of land.

The analogy or hypothetical presented by the Administrative Law Judge in Conclusion of Law No. 85 does not contain enough facts by which the applicability of Chapter 479,

Florida Statutes, in general, or the exemption requirements of Section 479.16(1), Florida Statutes, can be determined. As such, any legal conclusion in that regard is unsupportable in fact or in the law. In addition, whether the property is put to a rural use or an urban use is irrelevant to the analysis required by Section 479.16(1), Florida Statutes. This conclusion regarding Chapter 479, Florida Statutes, over which the **DEPARTMENT** has substantive jurisdiction, is as reasonable or more reasonable than the conclusion of the Administrative Law Judge.

The **DEPARTMENT'S** nineteenth exception is accepted and Conclusion of Law No. 85 is rejected.

The **DEPARTMENT'S** twentieth exception is to Conclusion of Law No. 86, because the **DEPARTMENT** proved the allegations in its notices of violation that the trucks constitute illegal signs which must be removed.

As detailed above, the trucks constitute a structure and a message and therefore meet the statutory definition of a sign. The trucks do not, however, satisfy the criteria for exemptions as on premises signs. Therefore, the trucks violate the provisions of Chapter 479, Florida Statutes. The **DEPARTMENT'S** conclusions of law are as reasonable or more reasonable than the Administrative Law Judge's conclusions in this regard.

The **DEPARTMENT'S** twentieth exception is accepted and Conclusion of Law No. 86 is rejected.

The **DEPARTMENT'S** twenty-first exception is to Conclusion of Law No. 87, because **EXIT 94** did not prove its claim of selective enforcement. The **DEPARTMENT** argues, in this regard, that a party claiming a violation of its equal protection rights because of selective

enforcement bears the heavy burden of establishing that it has been singled out for prosecution, while others similarly situated have not been proceeded against for similar conduct, and that this discriminatory selection for prosecution has been invidious or in bad faith, i.e., based on impermissible considerations such as race, religion, or the desire to prevent an exercise of constitutional rights. See State v. Parrish, 567 So. 2d 461, 465 (Fla. 1st DCA 1990), rev. den., 581 So. 2d 167 (Fla. 1991).

Review of the record in its entirety in general, and the Administrative Law Judge's findings of fact specifically, reveals that the **DEPARTMENT** has not selectively enforced its regulations. The Administrative Law Judge's findings accept the **DEPARTMENT'S** testimony regarding other trucks alleged by Mr. Sullivan to constitute signs and the **DEPARTMENT'S** actions regarding those trucks and others not identified by Mr. Sullivan. (Findings of Fact No. 64, 65, and 66) However, even if the **DEPARTMENT** had not taken enforcement action against others similarly situated to **EXIT 94**, the Florida Supreme Court has held that the mere failure to prosecute all offenders does not constitute a denial of equal protection. Meristem Valley Nursery, Inc. v. Metropolitan Dade County, 428 So. 2d 726, 728 (Fla. 3d DCA 1983)(citing Bell v. State, 369 So. 2d 932 (Fla. 1979)). See also Stocks v. Lee, 198 So. 211 (Fla.1940) (failure of authorities to enforce an ordinance against others constitutes no defense to one who is prosecuted under the ordinance).

To constitute a denial of equal protection, **EXIT 94's** claim of selective enforcement requires proof that the **DEPARTMENT** has deliberately afforded different treatment to other similarly situated persons based on an unjustifiable or arbitrary classification. Meristem Valley, 48 So. 2d at 728. See also City of Miami v. Walker, 169 So. 2d 842 (Fla. 3d DCA

1964), cert. den., 176 So. 2d 511 (Fla. 1965). In Walker, the court held that the city's failure to enforce zoning regulations in one or many cases does not affect its power to enforce the regulations in other cases. Walker 169 So. 2d at 843. In the court's words: "Whether the City has permitted several hundred or only a few filling stations to be within the prohibited distance requirement of the ordinance is conclusive of nothing insofar as appellees are concerned." Id. While the Administrative Law Judge concludes it is unnecessary to address **EXIT 94's** selective enforcement defense, the previous findings and conclusions and the record in its entirety lead to and support a conclusion that **EXIT 94's** claim was not established as a matter of fact or as a matter of law. Neither the record nor the law supports **EXIT 94's** claim of selective enforcement as authority for the proposition that its trucks should not have been issued notices of violation and should not be treated as signs.

The **DEPARTMENT'S** twenty-first exception is accepted and Conclusion of Law No. 87 is rejected.

FINDINGS OF FACT

1. After review of the record in its entirety, it is determined that the Administrative Law Judge's Findings of Fact in paragraphs 1-18, 20-26, 28-35, 37-53, 55-58, 60-62, and 64-66, are supported by competent, substantial evidence and are adopted and incorporated as if fully set forth herein.

2. Findings of Fact in paragraphs 19, 27, 36, 54, 59, and 63 of the Recommended Order, to the extent they are not supported by competent, substantial evidence, are modified as hereinabove stated and adopted as modified.

CONCLUSIONS OF LAW

1. The **DEPARTMENT** has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapters 120 and 479, Florida Statutes.

2. The Conclusions of Law in paragraphs 68, 71-75, 82, and 83, of the Recommended Order are fully supported in law. As such, they are adopted and incorporated as if fully set forth herein.

3. The Conclusions of Law in paragraph 70 of the Recommended Order, to the extent they are not supported in law, are modified as hereinabove stated, and adopted as modified.

4. The Conclusions of Law in paragraphs 69, 76-81, and 84-87 of the Recommended Order are rejected as not supported in law. The **DEPARTMENT'S** conclusions with regard to these paragraphs are as reasonable or more reasonable than the Administrative Law Judge's conclusions in the Recommended Order, and therefore the **DEPARTMENT'S** Conclusions of Law are adopted herein.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that those portions of the Administrative Law Judge's Recommended Order that were not rejected are hereby adopted in their entirety or as modified. It is further

ORDERED that the subject trucks owned by **Respondent, CAFÉ EROTICA/WE DARE TO BARE/ADULT TOYS/GREAT FOOD/EXIT 94, INC.**, are signs for the purposes of Chapter 479, Florida Statutes (2000), and as such do not qualify for an exemption as on premises signs under Section 479.16(1), Florida Statutes (2000). It is further,

ORDERED that the subject trucks owned by **Respondent, CAFÉ EROTICA/WE**

DARE TO BARE/ADULT TOYS/GREAT FOOD/EXIT 94, INC., shall be removed and shall not be parked by **Respondent, CAFÉ EROTICA/WE DARE TO BARE/ADULT TOYS/GREAT FOOD/EXIT 94, INC.**, within the controlled area of I-95, as defined in Section 479.01(4), Florida Statutes (2000). It is further

ORDERED that if the subject trucks owned by **Respondent, CAFÉ EROTICA/WE DARE TO BARE/ADULT TOYS/GREAT FOOD/EXIT 94, INC.**, are not removed from the controlled area of I-95, the **Petitioner, DEPARTMENT OF TRANSPORTATION**, shall remove the subject trucks and all costs of such removal are hereby assessed against **Respondent, CAFÉ EROTICA/WE DARE TO BARE/ADULT TOYS/GREAT FOOD/EXIT 94, INC.** It is further

ORDERED that the notices of violation issued against **Respondent, CAFÉ EROTICA OF FLORIDA, INC., d/b/a CAFÉ EROTICA**, are hereby rescinded.

DONE AND ORDERED this 9th day of October, 2001.

THOMAS F. BARRY, JR., P.E.
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
2001 OCT -9 AM 7:32

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

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