STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF TRANSPORTATION, Petitioner, vs. CAFE EROTICA OF FLORIDA, INC., d/b/a CAFE EROTICA, and CAFÉ EROTICA/WE DARE TO BARE/ADULT TOYS/GREAT FOOD/EXIT 94, INC., Respondents.	)	Case Nos. 00-4188T 00-4189T 00-4423T 00-4424T

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held on March 7, 2001, in Gainesville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jodi B. Jennings, Esquire
Department of Transportation
605 Suwannee Street
Haydon Burns Building, Mail Station 58
Tallahassee, Florida 32399-0450

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

STATEMENT OF THE ISSUE

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?

PRELIMINARY STATEMENT

This consolidated proceeding was initiated by the filing of requests for a disputed-fact hearing by Respondent Café Erotica of Florida, Inc., d/b/a Café Erotica and Respondent Café Erotica/Dare to Bare/Adult Toys/Great Food/Exit 94, Inc., pursuant to Section 120.57(1), Florida Statutes, in response to four Notices of Violation issued by the Florida Department of Transportation (DOT) for the erection of allegedly illegal signs. The cases were referred to the Division of Administrative Hearings sequentially, beginning on or about October 10, 2000. The four cases were consolidated on November 17, 2000.

At the disputed-fact hearing, DOT presented the oral 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 in evidence. Petitioner's Exhibits 13, 14 and 19 were withdrawn.

Café Erotica of Florida, Inc., d/b/a Café Erotica and Café Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc., presented the oral testimony of Jerry Sullivan, William Harry,

Russell Market, and Patricia Doorbar. Respondent's Exhibits 1a through 1cc and 2 through 16 were admitted in evidence.

At the close of DOT's case-in-chief, Respondent Café Erotica of Florida, Inc. d/b/a Café Erotica moved for its dismissal as a party on the grounds that no evidence had been presented which would make it a proper party hereto, and Respondent Café Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc., moved to dismiss on the basis that no prima facie case against it had been proven. These motions were denied, subject to revisitation in the Conclusions of Law, infra.

A Transcript was filed with the Division on May 2, 2001. The parties' respective timely-filed Proposed Recommended Orders have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. On or about September 21, 2000, DOT became aware that two trucks bearing written material were parked adjacent to DOT's right-of-way on the west side of Interstate 95 (I-95) in St. Johns County in such a manner that the written material was visible from the main-traveled way of I-95. DOT issued four Notices of Violation against the two trucks.

2. Notice of Violation number 10B TS 2000 539 was issued to Café Erotica of Florida, Inc., d/b/a Café Erotica on September 21, 2000, against a truck located adjacent to I-95,

2.015 miles north of SR 207, at milepost 15.823. This violation notice became DOAH Case No. 00-4188T.

3. Notice of Violation number 10B TS 2000 540 was issued to Café Erotica of Florida, Inc., d/b/a Café Erotica on September 21, 2000, against a truck located adjacent to I-95, 2.041 miles north of SR 207, at milepost 15.849. This violation notice became DOAH Case No. 00-4189T.

4. Notice of Violation number 10B BB 2000 539 was issued to Café Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc., c/o Gary Edinger, the registered agent for the corporation, on October 10, 2000, against the truck located adjacent to I-95, 2.015 miles north of SR 207. This violation notice became DOAH Case No. 00-4423T.

5. Notice of Violation number 10B BB 2000 540 was issued to Café Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc., c/o Gary Edinger, the registered agent for the corporation, on October 10, 2000, against the truck located adjacent to I-95, 2.041 miles north of SR 207. This violation notice became DOAH Case No. 00-4424T.

6. All of the foregoing notices alleged that the trucks are in violation of Chapter 479, Florida Statutes, in that they are unpermitted signs.

7. On October 24, 2000, DOT issued a letter to Café Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc.,

advising it that the trucks which were issued the above-referenced notices of violation had been 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 signs pursuant to Chapter 479, Florida Statutes.

8. I-95 is part of the Interstate Highway System. The two trucks are located at times within 660 feet of the nearest edge of the right-of-way of I-95. The trucks can be seen without visual aid by motorists of normal visual acuity traveling on I-95.

9. Admitted Fact Four of the parties' prehearing stipulation was that 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." However, their Admitted Fact Five, incorporating photographs, and other photographs in evidence reveal that one truck had the foregoing display without the slashes and one truck juxtaposed the phrases "Great Food" and "Adult Toys," also without the slashes. The trucks were located within 15 feet of the right-of-way fence and were parked on raised mounds of dirt, elevating them above the surrounding terrain. Immediately adjacent to the trucks were light fixtures with halogen lights aimed at the sides of the

trucks. If electricity had been available, the lights could have illuminated the vehicles. The trucks were intentionally placed at their locations.

10. As of January 5, 2001, additional verbiage was added to the trucks which states, "Hunt & Fish Camp." As of the March 7, 2001, date of hearing, the trucks still contained this additional verbiage.

11. 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, "CAFE′ 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," follow, vertical to the rest of the verbiage. There are no addresses, telephone numbers, arrows, or other identifying information.

12. Respondent Cafe Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc., is a Florida corporation. At all times material, Café Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc., has been a corporation in good standing with the Florida Department of State, which has registered and approved its corporate name pursuant to Section 607.0401, Florida Statutes. Asher G. Sullivan, Jr., a/k/a Jerry Sullivan, is incorporator, President, shareholder, and Director of the

corporation, which will hereafter be referred to as "Exit 94, Inc."

13. Exit 94, Inc., owns, insures, and maintains the two trucks which are the subject of this proceeding.

14. Exit 94, Inc., likewise owns the real property on which the trucks are located, which parcel consists of approximately 11 acres situated between I-95 exits 94 and 95.

15. Exit 94, Inc., does not sell food or adult toys. It does not offer dancers for public viewing. The business of Exit 94, Inc., is developing a hunting and fishing camp at the property it owns, the property where its trucks were cited by DOT, between I-95 exits 94 and 95.

16. Respondent Café Erotica of Florida, Inc., d/b/a Café Erotica, is a Florida corporation which holds the license and owns the assets of the Café Erotica restaurant. Jerry Sullivan also is president, shareholder, and owner of Café Erotica of Florida, Inc., which will hereafter be referred-to as "Café Erotica."

17. The St. Johns Management Company manages the Café Erotica restaurant. Jerry Sullivan also is the President and shareholder of the St. Johns Management Company.

18. The Café Erotica restaurant is a 24-hour per day, full-service restaurant which features dancers clad in bathing suits and which sells adult toys.

19. The Café Erotica restaurant is located at 2620 State Road 207 (SR-207), at the intersection of SR 207 and the exit 94 off-ramps from I-95. The real property owned by Café Erotica is not contiguous to the subject real property owned by Exit 94, Inc. The 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.

20. The Café Erotica restaurant currently advertises on its premises and on a billboard at exit 94 of I-95. 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.

21. The advertisements of Café Erotica currently at exit 94 of I-95 include the words, "private dances," and "great food/adult toys." The advertising is specifically directed at motorists, including truck drivers, on I-95.

22. In addition to the real property where its trucks were cited by DOT, which real property Exit 94, Inc., holds by warranty deed, Exit 94, Inc., leases property at the southeast corner of I-95's exit 93, where SR-206 intersects with I-95. At that location, Exit 94, Inc., displays a 14-foot by 25-foot permanent billboard sign reading "Café Erotica/We Dare to Bare/Great Food/Adult Toys/Exit 94, Inc." (Note

juxtaposition of part of the corporate name). Below this billboard, on the same leased property, is a smaller sign stating "Fish Camp" with a telephone number (P-11; TR 66-64, 73-74, 183-184). Exit 94, Inc., claims to maintain an office and a telephone on this leased property.

23. Mr. Sullivan's primary business is that of renting billboards for advertising purposes, which he owns. He has advertised on leased signs and has knowledge of DOT's sign permit requirements.

24. At one time, Mr. Sullivan intended to place a billboard on the property owned by Exit 94, Inc. He has not done so.

25. Neither Café Erotica nor Exit 94, Inc., has applied to DOT for sign permits for the subject trucks, nor paid any sign permit fees for them. No sign permits have been issued to any entity for the subject trucks.

26. When the Notices of Violation were issued, DOT inspectors did not enter on the real property owned by Exit 94, Inc., or pull any business licenses for the property. They viewed the trucks from I-95. No improvements were visible from I-95. DOT did not undertake any investigation to determine the owner(s) of the subject trucks or subject real property.

27. Café Erotica does not own any interest in the subject trucks or real property, and no citizen testified that the trucks had caused him/her to patronize the Café Erotica.

28. DOT witnesses acknowledged that the Notices of Violation issued to Café Erotica were essentially issued in error because DOT did not know the identity of the owner of the subject trucks and real property.

29. Upon discovering that Café Erotica did not own any interest in the subject trucks or real property, DOT made no effort to dismiss the violations against Café Erotica.

30. Jerry Sullivan has decision-making authority for both Respondents as a corporate officer of both corporations.

31. Jerry Sullivan makes management decisions concerning Café Erotica, including whether, and how, to advertise.

32. Jerry Sullivan has directed all activity on the Exit 94, Inc., property. He anticipates creating, maintaining, and charging people for the privilege of using the subject property as a fishing and hunting camp. He also intends to reward employees and clients of his various enterprises with free privileges at the camp.

33. Ninety percent of the time, the subject trucks are parked on the subject property. However, from time to time, the trucks, one of which was burned out and one of which has a "for sale" sign painted on its windshield, are driven off the Exit

94, Inc., property to haul equipment and corn to the subject property, for "truck maintenance," and for incidental uses in connection with Exit 94, Inc., and Mr. Sullivan's other business entities, including Café Erotica. On some of these occasions, the trucks are parked in the parking lot of the Café Erotica restaurant. The trucks are used off the Exit 94, Inc., property only two or three times per month. Except when under repair, they can be driven on the roads and highways.

34. Exit 94, Inc., paid approximately $35,000 for the subject property on or about April 9, 1999, well before the notices of violation.

35. Eight months prior to hearing (approximately three months before the notices of violation), Exit 94, Inc. dug a pond in a naturally low spot and/or a natural basin where Mr. Sullivan believed a pond originally had been on the subject property. A solar panel pump was installed to put water into the excavation because getting electricity run to the property was prohibitively expensive.

36. Inspection of the subject property by DOT personnel only occurred about two-and-one-half weeks before the disputed-fact hearing. At that time, the solar pump used to fill the pond with water was not working well, so that the possibility of fish living in the rather shallow pond was highly unlikely. The pond was not stocked with fish. The property was not stocked

with game animals. There was also one very ramshackle deer blind on the property and a permanent metal, utility pole had been erected to support another deer blind. There were no utilities, restrooms, offices, or facilities to clean game on the premises. No fishing equipment was available for purchase. This situation was memorialized by photographs in evidence.

37. The Exit 94, Inc., property has only one entrance which is not directly accessible from a public roadway. To reach Exit 94, Inc.'s, only entrance, a car gets off I-95 at exit 94, where Café Erotica is located, and proceeds to 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.

38. Thousands of acres of scrub pine belonging to the timber company surround Exit 94, Inc.'s property.

39. Entrance to the timber company land is through a fence/gate. The timber company gate is "posted," warning that hunting is not permitted on its land and that violators will be prosecuted.

40. The Exit 94, Inc., property is also "posted," and therefore not open to the general public. There is a "Café Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc., Hunt & Fish Camp" sign at its entrance.

41. 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.

42. Travelling as described above, there are approximately nine and one-half miles between exit 94 of I-95 and the Exit 94, Inc., property. There are no signs advertising a "hunt and fish camp" on this stretch of land, but Exit 94, Inc., has its billboard and other sign at Exit 93. (See Finding of Fact 22.)

43. Exit 94, Inc., presented accounts showing it spent over $7,003 maintaining its signs since 1999 and over $12,000 on the subject trucks.

44. 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 shack, placed there by Exit 94, Inc. The shack is not habitable as overnight lodging. It was designed to hold repair equipment and corn for seeding the pond for waterfowl and seeding the woods for deer. There is no evidence whether this method of luring game from the surrounding area is legal or illegal, but it is certainly feasible, given the location of the subject property. (See Finding of Fact 38.)

45. Russell Market is General Manager for the Café Erotica restaurant. He was directed by Mr. Sullivan to check on Exit 94, Inc.'s, subject property, and he did so once a week and scattered corn for nine months. He saw wild turkeys on the subject property.

46. Bill King is affiliated with Mr. Sullivan's companies. He has not hunted the subject property, but he sighted one of the deer stands.

47. No witness testified to having camped overnight on the subject property.

48. Bill Harry, who is employed by Mr. Sullivan, has hunted the subject property three or four times without success, despite once seeing a deer.

49. Jerry Sullivan killed a deer on the subject property.

50. There is no parking lot on the subject property. Respondents' witnesses testified that the subject trucks are parked on raised mounds of earth because the subject property is swampy. Only several hundred-by-60 feet have been cleared of brush.

51. There is no telephone service to the subject property. If someone dials the telephone number listed for Exit 94, Inc. on its application to be a fish farm (see Finding of Fact 55) which is the same number on its sign at I-95's exit number 93 (see Finding of Fact 22), a recorded message relays the caller

to a telephone number for the cell phone Mr. Sullivan carries on his person.

52. No utilities are currently available on the subject property, but the solar pump is in use at the pond. Bill Harry repaired the pond pump a few days after showing DOT personnel around the subject property. (See Finding of Fact 36.) At hearing, he testified that the pond is now filling well with water.

53. When the pond is full, Mr. Sullivan intends to stock it with fish.

54. Exit 94, Inc., holds an occupational license from St. Johns County as a "fish camp." In issuing this license, the County accepted Exit 94, Inc.'s, designation of its business without further inquiry.

55. Exit 94, Inc., has applied for a "fish farm" license from the Florida Game and Freshwater Fish Commission.

56. Exit 94, Inc., produced invoices sent to clients for hunting and fishing privileges on the subject property, corresponding checks in payment, and tax returns. Patricia Doorbar, bookkeeper for Exit 94, Inc. and all of Mr. Sullivan's other business entities, testified that she had drafted all of the invoices, and had prepared the tax returns. She further testified that she maintained Exit 94, Inc.'s corporate

financial books in accord with generally accepted accounting principles.

57. The invoices and payments reflect that other business entities controlled by Mr. Sullivan or his family members were billed and paid for use of the Exit 94, Inc., property.

58. Exit 94, Inc., currently operates at a loss, made up as necessary by Mr. Sullivan.

59. No legitimate reason was demonstrated to pierce the corporate veil of any of Mr. Sullivan's corporations.

60. Approximately two weeks before the disputed-fact hearing, Exit 94, Inc., made improvements to the subject property. These included laying out feed corn on the ground, repairing a deer stand so it could support one or more hunters, and repairing the solar pump. See supra. These improvements were memorialized by photographs in evidence.

61. Respondents asserted that DOT has selectively enforced the sign law against them on the basis of many photographs of trucks bearing written material which were admitted in evidence. The trucks typically carry a business name, address and telephone number. Some carried only a business name.

62. DOT rarely issues notices of violations for trucks. Within the last three-and-one-half years, trucks constituted approximately five such notices out of 3500 sign violation

notices of all kinds, not just off-premises signs. The notices to these two Respondents constitute four of the five notices.

63. 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.

64. In the normal course of business, DOT inspectors determine whether trucks constitute "on-premises signs" on a case-by-case analysis which weighs content of the sign, usage of the truck, location and length of time the truck is in a single location, and whether the sign content advertises the business at the location where the truck is parked, advertises another business, or advertises anything at all. Inspectors have wide discretion in issuing notices of violation.

65. With respect to the majority of Respondents' photographs presented at hearing, DOT representatives gave reasonable explanations why the truck owners had not been notified of violations, usually because the truck was being operated on the highway, was not parked over-long away from the business premises which it named, or was parked on the property of the business to which it belonged or which it named. In one instance, a contractor's truck was not charged with a violation because it was parked at a construction site which also bore a sign proclaiming that the construction work was being done by

that contractor. Sometimes the reason a truck had not been cited was because the truck had not been located. DOT does not research which corporations or persons own or operate trucks painted with business names, and apparently, precision in painting a business name on other operable trucks had no effect on DOT's decision to treat other operable trucks as "on-premises signs" so that no notices of violation were issued against them.

66. Similar photographs of trucks which Mr. Sullivan had sent to DOT were personally evaluated by DOT's Assistant Right-of-Way Manager for Operations, but this measure was only in response to the Respondents' allegations of selective enforcement in the instant case. The Assistant Right-of-Way Manager directed DOT district personnel to take either further investigative or regulatory action as she instructed on a case-by-case basis. One truck for "Smiley's" was subsequently issued a violation notice.

CONCLUSIONS OF LAW

67. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Section 120.57(1) and Chapter 479, Part III, Florida Statutes.

68. DOT contends that the trucks cited constitute "signs" as defined in Chapter 479, Florida Statutes; that they do not advertise the business of Exit 94, Inc., and that, therefore,

the trucks cannot be "on-premises" signs, but are, in fact, "off-premises" advertisements for the Café Erotica, and so must be permitted by DOT, for a fee, or removed by the sign owner. Respondents maintained that the subject trucks are used for transport and storage of materials related to Exit 94, Inc.'s, business on the subject property which Exit 94, Inc., owns and is developing as a fishing and hunting camp.

69. The remedy sought in this case is not precisely a "penal" one as contemplated by the recent case of Chancellor Media Whiteco Outdoor v. Department of Transportation, 2001 W.L. 201517, 26 Fla. L. Weekly D627 (Fla. 5th DCA March 2, 2001), because there is no sign permit to revoke. However, the effect is the same, in that DOT seeks to deny Respondent Exit 94, Inc., the right to use its own personal property (the subject trucks) on its own real property. Accordingly, this case involves a valuable economic property right, and DOT should be held to the higher burden of proof established in that case of "clear and convincing evidence." However, even if DOT merely has the duty of going forward and proving each violation by a preponderance of the evidence, it cannot prevail. See Florida Department of Transportation v. J.W.C., Co. Inc., and the Department of Environmental Regulation, 396 So. 2d 778 (Fla. 1st DCA 1981).

70. The motion to dismiss Café Erotica as a party is well-founded. Respondent Café Erotica of Florida, Inc., d/b/a Café

Erotica, may have incidentally benefited by the words on the trucks owned by Respondent Café Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc., but Café Erotica does not own the subject real property or trucks, and therefore, it is not a proper party Respondent. DOAH Case Nos. 00-4188T and 00-4189T should be dismissed.

71. Section 479.01(17), Florida Statutes, provides, in pertinent part,

> "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.

72. Section 479.01(6), Florida Statutes, provides,

> "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.

73. Section 479.07(1), Florida Statutes, provides,

> Except as provided in Sections 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.

74. Section 479.01(4), Florida Statutes, defines "controlled area" to mean "660 feet or less from the nearest edge of the right-of-way of any portion of the State Highway System, interstate, or federal-aid primary system. . . ."

75. Section 479.150(1), Florida Statutes, provides,

> Any sign which is located adjacent to the right-of-way of any highway on the State Highway System outside an incorporated area or adjacent to the right-of-way on any portion of the interstate or federal-aid primary highway system which sign was erected, operated, or maintained without the permit required by Section 479.07(1) having been issued by the department, is declared to be a public nuisance and a private nuisance and shall be removed as provided in this section.

76. A straightforward reading of the statute reveals that the subject trucks are not signs. They are neither "structures," nor "erected."

77. Moreover, the instant case is on all fours with Sun City Shell, Inc. v. Department of Transportation, 626 So. 2d

1097 (Fla. 1st DCA 1993), where the First District Court of Appeal determined that a parked trailer was not a "sign" under the foregoing outdoor advertising statute merely because the trailer was visible from a federally-assisted road. Therein, a fully-operational 40-foot, over-the-road trailer detached from, but normally towed by, a truck, and bearing only the truck owner's name in large, black lettering along the side, with no other markings such as an arrow, address, or phone number and primarily used to store equipment for the truck owner's mining operation on leased real property was held not "designed, intended, or used to advertise or inform," and thus not a sign. See Department of Transportation v. Sun City Shell, Inc., DOAH Case No. 91-4733T (Recommended Order April 27, 1992), for facts not fully discussed in the appellate opinion. The trucks herein are also very different than the single truck in Department of Transportation v. Sunshine Patio Shops, Inc., DOAH Case No. 86-2288T (Recommended Order, December 15, 1986) which truck was used as a "retail establishment."

78. Herein, if anything, the case is stronger for Respondent Exit 94, Inc., because it also owns the land upon which the trucks are parked, and the trucks are operated regularly on the highways in furtherance of their owner's business conducted on the real property. Also, after the notices of violation, 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."

79. The corporate name of the truck's owner may not make any logical sense for a hunting and fishing camp as far as DOT is concerned, and DOT may speculate that it has some incidental value to Mr. Sullivan's other corporate Respondent in this case, but denial of use of a duly-registered corporate name is not DOT's prerogative. A corporation has a right to use the full corporate name approved by the Department of State. In light of the corporate books and materials provided by Exit 94, Inc., and Ms. Doobar's testimony, DOT has been unable to demonstrate herein any legitimate reason to "pierce the corporate veil" or to determine that Exit 94, Inc., is a bogus or fraudulent "front" for something else. Many individuals hold ownership and managerial interests in more than one corporation and exercise those interests to the mutual benefit of more than one corporation while limiting their personal liability. The law permits this use of a corporate shield.[1]

80. Given DOT's pattern of not checking who are the corporate owners of operable trucks and of not citing operable trucks as "signs," even where the trucks bear imprecise or jumbled statements of owners' names, corporate or otherwise, the absence of slashes on both of Exit 94, Inc.'s, trucks and the

juxtaposition of phrases within the corporate name on one truck are immaterial, and both of Exit 94, Inc.'s, trucks should be afforded the protection of the decision in the Shell City Sun, Inc., case.

81. Assuming, arguendo, but not ruling, that the corporate trucks are "signs," an exemption from the permitting requirements of Section 479.07(1), Florida Statutes, exists for "on-premises" signs, as defined in Section 479.16(1), Florida Statutes.

82. Section 479.16(1), Florida Statutes, 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 Section 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 Section 479.11(5), . . .

83. The burden to establish an exemption falls upon the party seeking to establish the exemption, in this case, Exit 94, Inc. See Florida Department of Transportation v. J.W.C. Co. Inc., and the Department of Environmental Regulation, supra.

84. While DOT witnesses may consider the wild game on the subject property to be inferior, scarce, or non-existent, may consider the equipment inferior, and may consider the location poor, these opinions do not refute Exit 94, Inc.'s evidence establishing that a pond was dug and a solar panel pump was installed prior to the notices of violation; that the property has been legally licensed for a camp; that an application for a fish farm has been made; that a permanent metal utility pole has been erected to support a deer stand; and that people have actually hunted there, been billed, and have paid Exit 94, Inc., for the privilege of using its property for hunting. The fact that there remains a great deal more to do to get the camp project out of the red and showing a profit does not preclude an exemption for an on-premises sign, although the length of time the property will be "in development" and the validity of the steps already taken toward creating or expanding a fully-functioning business entity should be weighed. See the Final Order in Department of Transportation v. Florida Roadmaster Inn Services, Corp., DOAH Case No. 91-4785T (Recommended Order March 24, 1992; Final Order June 1, 1992), affirmed in Roadmaster Inn Services, Corp. v. Department of Transportation, 621 So. 2d 435 (Fla. 1st DCA 1993), distinguishing Harrison v. Department of Transportation, 349 So. 2d 720 (Fla. 1st DCA 1977), decided under a previous statute, and rejecting the

proposition that intent to develop a business in the future, without more, is sufficient cause to invoke the on-premises exemption. Herein, it was shown that significant activity toward establishing a business activity on the property has already occurred.

85. If the Exit 94, Inc., camp were a fully-developed strip mall with these operable trucks parked in its concrete parking lot, the trucks would clearly qualify for the on-premises exemption under DOT's current approach to the complaints against, and photographs of, other operable trucks bearing only owner-identifiable material. Just because the camp constitutes a rural "use" of land, is still in active development, and its trucks are parked on the highest ground currently available instead of on a concrete parking lot, should not alter Exit 94, Inc.'s, entitlement to the on-premises exemption for its operable trucks.

86. Accordingly, DOAH Case Nos. 00-4423T and 00-4424T, against Exit 94, Inc., should be dismissed as not proven.

87. The foregoing conclusions make it unnecessary to address Respondents' affirmative defense of selective enforcement.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED

That the Department of Transportation enter its final order

(1) Dismissing Café Erotica of Florida, Inc., d/b/a Café Erotica, as a party to this action; and

(2) Finding Café Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc., not guilty of having unpermitted signs and vacating the notices of violation against it.

DONE AND ENTERED this 12th day of July, 2001, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of July, 2001.

ENDNOTE

1/ DOT asserts that 23 USC Section 131 and 23 CFR Sections 750.704 and 750.709 permit piercing of the corporate veil whenever necessary to "curb attempts to improperly qualify outdoor advertising as 'on-property signs'." I disagree.

Section 479.02(1), Florida Statutes, provides for DOT to: "Administer and enforce the provisions of this chapter and the agreement between the state and the United States Department of Transportation relating to the size, lighting, and spacing of signs in accordance with Title I of the Highway Beautification Act of 1965 and Title 23, United States Code, and federal regulations in effect as of the effective date of this act."

However, the quoted federal statute and regulations urged by DOT only permit state laws and state regulations to contain criteria, including a property test and a purpose test, sufficiently specific to "curb attempts to improperly qualify outdoor advertising on '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 Section 131."

In Florida's regulatory scheme, any such tests to determine that a corporation's purpose is clearly to circumvent the law would have to either clearly appear in the statute or be promulgated by DOT as rules under Chapter 120, Florida Statutes.

Herein, I am compelled to apply existing Florida statutes and case law to the evidence herein. There are no DOT rules providing further tests to determine when a purpose exists to circumvent the law.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.