

7-12-01

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

FILED  
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DIVISION OF  
ADMINISTRATIVE  
HEARINGS

DEPARTMENT OF TRANSPORTATION,

AT

EJD-UOS

Petitioner,

vs.

DOAH CASE NO.: 01-0727T

DOT CASE NO.: 01-022

CAFÉ EROTICA/WE DARE TO BARE/  
ADULT TOYS/GREAT FOOD/  
EXIT 94, INC.,

Respondent.

FINAL ORDER

This proceeding was initiated by the filing of a request for a formal administrative hearing on February 7, 2001, by Respondent, 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 a Notice of Violation issued by the Petitioner, DEPARTMENT OF TRANSPORTATION (hereinafter DEPARTMENT). On February 21, 2001, the matter was referred to the Division of Administrative Hearings (hereinafter DOAH) for assignment of an Administrative Law Judge and a formal hearing.

A formal administrative hearing was held in this case in Gainesville, Florida, on April 10, 2001, before 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 Respondent: Gary S. Edinger, Esquire  
305 Northeast First Street  
Gainesville, Florida 32601

At the hearing the **DEPARTMENT** presented the testimony of Tom Simmons, Donald Cerlanek, James L. Acosta, and Leo Giannini, and Petitioner's Exhibits P-1 through P-5 and P-7, which were admitted as offered. Exhibit P-6 was withdrawn. **EXIT 94** called Jerry Sullivan, and offered Respondent's Exhibits R-1 through R-8, which were admitted into evidence. The Joint Prehearing Statement with Notice of Filing Exhibits to Joint Prehearing Statement was admitted as Joint Exhibit 1. On June 12, 2001, the **DEPARTMENT** filed a Proposed Recommended Order and on June 14, 2001, **EXIT 94** filed a Proposed Recommended Order. On July 12, 2001, Judge Davis issued her Recommended Order. **EXIT 94** filed Respondent's Exceptions to Recommended Order on July 30, 2001, three days after the date due. On August 1, 2001, the **DEPARTMENT** filed its response to **EXIT 94'S** exceptions.

#### STATEMENT OF THE ISSUE

As stated by the Administrative Law Judge in her Recommended Order, the issue presented was: "Whether the sign against which the Department of Transportation issued Notice of Violation 10B ST 2001 502, violates Chapter 479, Florida Statutes, so that the sign must be removed."

## BACKGROUND

On January 30, 2001, the DEPARTMENT issued Notice of Violation 10B ST 2001 502, against an outdoor advertising sign located adjacent to Interstate 95, 7.998 miles north of the Flagler County line in St. Johns County, Florida. The notice alleged the sign violates Chapter 479, Florida Statutes, in that it is unpermitted. The DEPARTMENT contends that the sign advertises for the Café Erotica restaurant, a business establishment not located on the same premises as the sign, and that there is no visible business occurring on the premises where the sign is located. Interstate 95 is part of the Interstate highway system. The sign is located within 660 feet of the nearest edge of the right of way of Interstate 95, and can be seen without visual aid by motorists of normal visual acuity traveling on Interstate 95. The sign is a "permanent" sign and has never been permitted by the DEPARTMENT.

## EXCEPTIONS TO RECOMMENDED ORDER

EXIT 94'S exceptions were not timely filed and are, therefore, rejected. Moreover, had the exceptions been timely filed, they would have nonetheless been rejected based upon the following analysis.

In its first exception, EXIT 94 suggests that the reference in finding of fact 14 to the property being completely dry resulted from a misconstruction of the testimony because the subject property was not intended to be used as a fishing hole and was employed as an office for a fish camp located elsewhere in St. Johns County. EXIT 94 has apparently misread the finding which states:

14. Mr. Sullivan testified that he never intended to develop a hunting and fishing camp on Mr. Giannini's exit 93 southeastern quadrant property because it is completely dry,

although he once intended to develop a pond on the northwestern quadrant of exit number 93, part of which quadrant is also owned by Mr. Giannini. [Emphasis added]

The Administrative Law Judge clearly recognized that Mr. Sullivan did not intend to use the subject property for a "fishing hole."

To the extent **EXIT 94'S** first exception is viewed as a challenge to the Administrative Law Judge's ultimate conclusion that no business was conducted on the premises, that conclusion is amply supported by the record and a number of uncontested findings of fact based thereon, and cannot, therefore, be set aside by the **DEPARTMENT**. Heifetz v. Dep't of Business Reg., 475 So. 2d 1277, 1281-1282 (Fla. 1st DCA 1985).

**EXIT 94'S** first exception is rejected.

**EXIT 94'S** second exception goes to the Administrative Law Judge's findings of fact 16 and 18 which recognized that the address on **EXIT 94's** St. Johns County occupational license was not the address for the property in issue. **EXIT 94** contends that its witness "explained that the minor discrepancy in address was the result of a clerical error on the part of St. Johns County and that the license was in fact for the subject property." The Administrative Law Judge evidently afforded this testimony little or no weight or credibility and rejected it. The **DEPARTMENT** cannot properly revisit the Administrative Law Judge's weight and credibility determinations. Neither an agency nor a reviewing court has the authority to substitute its view of the evidence for that of the Administrative Law Judge. Boyd v. Dep't of Revenue, 682 So. 2d 1117, 1118 (Fla. 4th DCA 1996); Heifetz, 475 S. 2d at 1281-1281.

In any event, the existence of an occupational license for the subject property is but one

of a number of factors going to the showing that a business was being conducted on the premises. Even if the license had the correct address, there is ample record support, set out in numerous findings of fact to which **EXIT 94** has taken no exception, for the Administrative Law Judge's ultimate conclusion that no business was conducted on the premises.

**EXIT 94'S** second exception is rejected.

**EXIT 94**, in its third exception, contends that "[w]ith respect to paragraph 36, the Judge's finding that St. Johns County has not issued a building permit for this sign is irrelevant and immaterial." At the time the **DEPARTMENT** elicited the testimony concerning the lack of a building permit for the sign, **EXIT 94** made no objection to its admission based on relevance, materiality, or any other ground. Moreover, the testimony was both relevant and material inasmuch as the existence of a building permit for the sign structure was a factor considered by the **DEPARTMENT'S** inspector in determining whether there was a viable business located on the property. See §§ 90.401 and 90.402, Fla. Stat. (2000).

**EXIT 94'S** third exception is rejected.

**EXIT 94'S** fourth exception takes issue with the Administrative Law Judge's conclusion of law 53 complaining that the Administrative Law Judge failed to note that **EXIT 94** holds an occupational license to conduct business at the subject premises.

For the reasons set out in the disposition of its second exception, **EXIT 94'S** fourth exception is rejected as well.

### **FINDINGS OF FACT**

After review of the record in its entirety, it is determined that the Administrative Law Judge's Findings of Fact in paragraphs 1 through 42 of the Recommended Order are supported

by the record and are accepted.

### 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 43 through 62 of the Recommended Order are fully supported in law. As such, they are adopted and incorporated as if fully set forth herein.

### ORDER

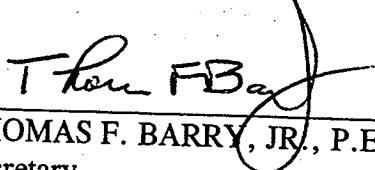
Based upon the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Administrative Law Judge's Recommended Order and recommendation therein are adopted. It is further

**ORDERED** that Respondent, **CAFÉ EROTICA/WE DARE TO BARE/ADULT TOYS/GREAT FOOD/EXIT 94, INC.**, shall remove its outdoor advertising sign, which is the subject of Notice of Violation 10B ST 2001 502, within thirty (30) days of the date of this Final Order. It is further

**ORDERED** that should Respondent, **CAFÉ EROTICA/WE DARE TO BARE/ADULT TOYS/GREAT FOOD/EXIT 94, INC.**, fail to remove the subject sign within the thirty (30) day period, the Petitioner, **DEPARTMENT OF TRANSPORTATION**, or its contractor will remove said sign and all costs associated with such removal are assessed against Respondent, **CAFÉ EROTICA/WE DARE TO BARE/ADULT TOYS/GREAT**

FOOD/EXIT 94, INC.

DONE AND ORDERED this 2nd 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  
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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:

Bruce R. Conroy, Esquire  
Chief, Administrative Law  
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The Honorable Ella Jane P. Davis  
Administrative Law Judge  
Division of Administrative Hearings  
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