10-24-01

AP

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

DEPARTMENT OF TRANSPORTATION,

Petitioner,

BJS-Closed

vs.

DOAH CASE NO.: 01-1430T
DOT CASE NO.: 01-047

G & J MANAGEMENT COMPANY,

Respondent.
_____/

FINAL ORDER

This proceeding was initiated by the filing of a Request for Formal Administrative Hearing on March 21, 2001, by **Respondent, G & J MANAGEMENT COMPANY**, (hereinafter **G & J**), pursuant to Section 120.57(1), Florida Statutes, in response to a Notice of Unpermitted Vegetation Removal issued by the **Petitioner, DEPARTMENT OF TRANSPORTATION** (hereinafter **DEPARTMENT**). On April 9, 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 Gainesville, Florida, on August 20, 2001, before the Honorable Barbara J. Staros, a duly appointed Administrative Law Judge. Appearances on behalf of the parties were as follows:

For Petitioner: Robert M. Burdick, 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 Richard Bailey, William Moriaty, and Juanice Hagan, and offered Petitioner's exhibits 1 through 6, which were admitted into evidence. **G & J** presented the testimony of Asher G. Sullivan, William Moriaty, and Juanice Hagan, and offered Respondent's exhibits 1 through 3, which were admitted into evidence. Official recognition was taken of all relevant statutes and rules. The transcript of the hearing was filed on September 4, 2001. On September 18, 2001, **G & J** filed a Proposed Recommended Order. On September 21, 2001, the **DEPARTMENT** filed a Proposed Recommended Order. On October 28, 2001, Judge Staros issued her Recommended Order. On November 8, 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: "Whether Respondent engaged in, or benefitted from, the unpermitted removal, cutting, or trimming of vegetation."

BACKGROUND

The **DEPARTMENT** notified **G & J** by certified letter dated January 16, 2001, that vegetation was removed from the off-premise outdoor advertising sign owned by **G & J** and

located along Interstate 75 in Pasco County, Section 14140, milepost 13.392, state permit number BS-600, without a permit issued by the **DEPARTMENT**. The letter of January 16, 2001, did not contain a notice of rights to an administrative hearing. On February 23, 2001, a second certified letter containing a notice of administrative hearing rights regarding the allegations contained in the January 16, 2001, letter was sent by the **DEPARTMENT** to **G & J**.

On March 21, 2001, **G & J** filed a Request for Formal Administrative Hearing and the matter was referred to DOAH on April 2, 2001. The matter was heard on August 20, 2001.

DEPARTMENT'S EXCEPTIONS TO RECOMMENDED ORDER

The **DEPARTMENT'S** first exception is that the Administrative Law Judge generally found and concluded that **G & J** was not interested in advertising on the sign where the alleged illegal vegetation cut occurred, but acquired the sign for its permit, to hold for trading or otherwise to use for leverage. The Administrative Law Judge then concluded that **G & J** had not benefitted from the illegal vegetation cut because the sign had not been rented to an advertiser and was not being actively marketed. The **DEPARTMENT** also contends that the Administrative Law Judge improperly concluded that there was no evidence establishing that **G & J** engaged in or authorized the illegal cutting. The **DEPARTMENT** argues that such findings and conclusions in paragraphs 4 and 15 of the Recommended Order ignore and deny the existence of the **DEPARTMENT'S** circumstantial evidence that could lead a reasonable person to conclude that **G & J** did perform or authorize the illegal cutting. The Administrative Law Judge's findings and conclusions in this regard, according to the **DEPARTMENT**, are not supported by competent, substantial evidence and incorrectly construe the law.

The **DEPARTMENT'S** exception constitutes, in part, a request to re-weigh the evidence, re-judge the credibility of the evidence and witnesses, and otherwise re-interpret the evidence. However, "an administrative agency is not authorized to weigh or reweigh the evidence presented, judge the credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion." Perdue v. TJ Palm Assoc., Ltd., 755 So. 2d 660, 665 (Fla. 4th DCA 1999) (citing Heifetz v. Dep't of Bus. Reg., 475 So.2d 1277, 1281-1282 (Fla. 1st DCA 1985)). When reviewing recommended orders of an Administrative Law Judge, an agency may not reject the findings of fact "unless it is first determined that the findings were not based upon competent, substantial evidence, or that the proceedings did not comply with the essential requirements of law." Perdue, 775 So. 2d at 665.

While the record reflects that the only evidence relied upon by the Administrative Law Judge was the self-serving testimony of Asher G. "Jerry" Sullivan, a partner in **G & J**, and its only witness, it is the province of the Administrative Law Judge to weigh the evidence and judge credibility. However, based upon a plain reading of Section 479.106, Florida Statutes, and the overall intent of Chapter 479, Florida Statutes, any findings regarding any purported reasons **G & J** may have had for purchasing the subject sign, and **G & J'S** interest in marketing the sign, are irrelevant to the issue of whether **G & J** benefitted from the illegal cutting. However, findings in this regard are not included in Finding of Fact No. 4 or Conclusion of Law No. 15. As such, because the findings and conclusions of Finding of Fact No. 4 and Conclusion of Law No. 15 are supported by competent substantial evidence, they cannot be disturbed.

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

The **DEPARTMENT'S** second exception is to Finding of Fact No. 5, which contains the following statements:

> Mr. Sullivan purchased the billboards for the purpose of obtaining billboard permits from the Department. These permits have a value separate and apart from the ability to advertise. That is, such permits can be traded-in for vegetation cuts elsewhere or otherwise used for leverage with other billboard companies.

The **DEPARTMENT** also takes exception to Finding of Fact No. 9 that **G & J** was not advertising on the subject sign to support the conclusion that **G & J** therefore did not benefit from the illegal vegetation cut. The **DEPARTMENT** claims that these findings are not supported by competent, substantial evidence.

In support of this exception, the **DEPARTMENT** argues that outdoor advertising sign permits exist for the purpose of authorizing the construction and maintenance of signs. See § 479.07, Fla. Stat. (2001). Signs are a combination of structure and message "designed, intended, or used to advertise or inform," and **G & J'S** only business is that of outdoor advertising. § 479.01(17), Fla. Stat. (2001). According to the **DEPARTMENT**, any reasonable person understands that the intrinsic value of an outdoor advertising sign located along a highway is its ability to advertise to the traveling motorist. The only way a sign permit can have any potential value in addition to the ability to advertise on the sign flows from the provisions of Section 479.106(5), Florida Statutes. Under Section 479.106(5), Florida Statutes, the **DEPARTMENT** may only grant a permit for a new sign that will require removal or cutting of vegetation to be seen from the road when the sign owner removes at least two comparable non-conforming signs and surrenders the permits therefor.

The **DEPARTMENT** also argues that the Administrative Law Judge's finding that the subject sign has some independent value is speculative and not supported by competent, substantial evidence. In order to find that this sign has independent value, it is necessary to find that the sign is non-conforming and comparable in size to some proposed sign. The entire factual record that could support the finding consists of the testimony of Jerry Sullivan, a partner and director of **G & J**, which the **DEPARTMENT** contends is insufficient to constitute the competent, substantial evidence necessary to support it.

The **DEPARTMENT** continues that Mr. Sullivan's testimony is not sufficient to support the finding that the permit for the subject sign has some value separate and apart from its obvious purpose of advertising. There is no evidence in the record from which the Administrative Law Judge could conclude that the sign at issue is non-conforming or is comparable in size to any proposed sign. Without such evidence, the **DEPARTMENT** asserts, there is no basis for finding that the subject permit had any possible value aside from its inherent advertising value. The most that a reasonable mind would conclude from the evidence presented is that it is possible, if the subject sign is non-conforming, that the permit could have some value separate from the ability to advertise on the sign.

The only evidence relied upon by the Administrative Law Judge was the self-serving and, in part, incompetent testimony of Jerry Sullivan, **G & J'S** only witness. Nevertheless, it is the province of the Administrative Law Judge to judge credibility. However, Mr. Sullivan's testimony and the Administrative Law Judge's findings regarding Mr. Sullivan's subjective value of the sign, his intent in purchasing the sign, and his marketing of the sign are irrelevant to the legal issue presented. While there is substantial evidence to support the

DEPARTMENT'S position, the findings of fact with respect to Mr. Sullivan's intent in purchasing the subject sign and others, the marketing of those signs, and speculation as to their value beyond their ability to present advertising or informative messages to the traveling public, despite their lack of relevance, cannot be disturbed.

In Finding of Fact No. 9 the Administrative Law Judge finds that Mr. Sullivan is not responsible for placing copy on the subject sign but, contradictorily, finds that it is Mr. Gunter, not Mr. Sullivan, who handles "such matters." The record contains Mr. Sullivan's admissions that he does not handle such matters, that he saw the sign only once when it was purchased, that Mr. Gunter does all of the work on the signs, and that **G & J** placed the message on the sign. (T. 63, 71-71) Nevertheless, Mr. Sullivan testifies, and the Administrative Law Judge makes findings, that the message "THIS SIGN FOR RENT CALL (352) 867-1557" was the "wrong copy," and that he is not actively marketing the sign for advertising purposes. (T. 63-64)(RO. 9[1])(Petitioner's exhibit 3[2]) Although irrelevant to the legal issue to be decided in this case, there is no record evidence and not a single finding that **G & J** never marketed the sign or placed wrong copy on the sign, and Mr. Sullivan never testified as such. If relevant, such testimony and findings would be necessary to support a conclusion that the sign was never marketed and that the message that the sign was for rent was wrong.

---

[1] References to the Administrative Law Judge's Recommended Order will be in the form of (RO.), followed by the appropriate paragraph number(s).

[2] References to the transcript of the August 20, 2001, hearing will be in the form of (T.), followed by the appropriate page number(s).

The **DEPARTMENT** recognizes that it is beyond its province to re-weigh the evidence, re-judge the credibility of the evidence and witnesses, or otherwise re-interpret the evidence. Perdue, 755 So. 2d at 665. However, the Administrative Law Judge's findings of fact must be supported by competent, substantial evidence, which has been described as such evidence "as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." De Groot v. Sheffield, 95 So. 2d 912 (Fla. 1957). Competent, substantial evidence is that sufficiently relevant and material evidence that a reasonable mind would accept as adequate to support the conclusion reached. Id. Based upon the record as a whole, it is more than arguable and beyond reasonable to conclude that the evidence, consisting solely of Mr. Sullivan's testimony, is neither competent nor substantial. However, it is unnecessary to reach such a conclusion or reject those findings, because those findings are irrelevant to the legal issue to be determined in this case.

Moreover, these findings and others support a conclusion that the Administrative Law Judge has misinterpreted Section 479.106, Florida Statutes, added criteria to the statute, and lost sight of the only legal inquiry in this case, which is whether **G & J** benefitted from the illegal removal of vegetation from the **DEPARTMENT'S** right of way as contemplated by the statute. Nevertheless, despite the fact those findings are irrelevant to the inquiry, and cannot and do not support the Administrative Law Judge's conclusions of law and recommendation in this case, the Administrative Law Judge's findings in this regard cannot be disturbed.

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

The **DEPARTMENT'S** third exception is also to a portion of Finding of Fact No. 9, which contains the following statements:

> Mr. Sullivan did not place this copy on the billboard. He leaves such matters to his business partner, Tom Gunter. The copy was placed on the billboard so that the board would not be deemed abandoned. Mr. Sullivan, however, asserts that this was the wrong copy and furthers [sic] asserts that he is not actively marketing the billboard for advertising purposes nor has he ever actively marketed the subject billboard.

According to the **DEPARTMENT**, the finding that "[t]he copy was placed on the billboard so that the board would not be deemed abandoned," is not supported by competent, substantial evidence. In addition, the finding that "Mr. Sullivan, however, asserts that this was the wrong copy and furthers [sic] asserts that he is not actively marketing the billboard for advertising purposes nor has he ever actively marketed the subject billboard," is irrelevant. The finding, "[t]he copy was placed on the billboard so that the board would not be deemed abandoned," is also not supported by competent, substantial evidence.

The **DEPARTMENT** contends that the Administrative Law Judge properly found that "Mr. Sullivan did not place this copy on the billboard. He leaves such matters to his business partner, Tom Gunter." However, once finding that Mr. Sullivan had nothing to do with the placement of the copy seeking advertisers, the Administrative Law Judge had no basis for further findings based upon his testimony. The finding that "The copy was placed on the billboard so that the board would not be deemed abandoned." is illogical, unsupported, and inconsistent with the Administrative Law Judge's Finding of Fact No. 8 that the board displayed the words "This sign for rent."

Mr. Sullivan testified that **G & J** placed the copy which seeks advertisers on the board. Mr. Sullivan also testified that Mr. Gunter is his partner in **G & J**, and that placing copy on the board was the responsibility of Mr. Gunter. Any partner may bind a partnership by acts

within the scope of the partnership business. See generally Tate v. Clements, 16 Fla. 339 (1878). It is the **DEPARTMENT'S** position that Mr. Sullivan is not competent to testify to his partner's intentions and Mr. Gunter did not testify at the hearing. The uncontradicted fact, as acknowledged by Mr. Sullivan, is that **G & J** has copy on the subject sign seeking advertisers for the sign. Even if the sign were non-conforming, a fact of which there is no evidence whatsoever in the, the placement of this type of copy would not prevent the sign from being deemed abandoned. See Fla. Admin. Code R. 14-10.007.

It is the **DEPARTMENT'S** position that no reasonable mind could conclude on this record that the copy seeking advertisers was placed on the sign so that the sign would not be deemed abandoned. The Administrative Law Judge's finding in that regard is not supported by competent, substantial evidence and should be rejected. See De Groot v. Sheffield, 95 So. 2d at 916. The only findings that can reasonably be made from the record is that the "for rent" copy was placed on the sign by **G & J** and that **G & J** was actively marketing the sign. The Administrative Law Judge properly made the first finding, but erred in rejecting the second.

A review of the law and of the record in its entirety establishes that it is more than reasonable and more than arguable that the only evidence regarding the sign's unavailability, despite the unrefuted evidence that the sign carried copy "THIS SIGN FOR RENT CALL (352) 867-1557," consisting solely of Mr. Sullivan's testimony, is neither competent nor substantial. (T. 59-72)(Petitioner's exhibits 1, 3) For example, by Mr. Sullivan's admissions, **G & J'S** only business is that of outdoor advertising and the large outdoor advertising companies will not sell billboards to **G & J** because those companies "don't believe in my [Mr. Sullivan's] thing." (T. 71, 62) However, it is unnecessary to reach the issue of the

testimony's competence or to reject these findings, because the findings are irrelevant to and do not and cannot control the legal issue to be determined in this case. Moreover, these irrelevant findings do not and cannot support the Administrative Law Judge's conclusions of law and recommendation in this case. These findings and others support a conclusion that the Administrative Law Judge misinterpreted Section 479.106, Florida Statutes, added criteria to the statute, and lost sight of the only legal inquiry in this case, which is whether **G & J** benefitted from the illegal removal of vegetation from the **DEPARTMENT'S** right of way as contemplated by Section 479.106, Florida Statutes. Nevertheless, although misdirected and irrelevant to the inquiry, the Administrative Law Judge's findings in this regard, once again, cannot be disturbed.

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

The **DEPARTMENT'S** fourth exception is to certain portions of Conclusion of Law No. 14 in which the Administrative Law Judge concluded that the **DEPARTMENT** must meet the clear and convincing standard of proof in this case. The **DEPARTMENT** does not dispute that the clear and convincing standard may apply to the imposition of the administrative penalty, but the standard does not apply to the mitigation requirement also sought to be enforced. Section 479.106, Florida Statutes, requires mitigation in accordance with **DEPARTMENT** rules for any removal or cutting of vegetation in **DEPARTMENT** right of way, whether authorized or illegal. Mitigation is not a penalty imposed for an illegal cutting, just replacement of public resources that were removed for the benefit of a private person. Because there is nothing punitive about the basic requirement to perform mitigation, the standard of proof for determining **G & J'S** responsibility to perform mitigation should be the

preponderance of the evidence standard. § 120.57(1)(j), Fla. Stat. (2001); see generally Osborne Stern & Co. v. Dep't of Banking & Finance, 670 So. 2d 932 (Fla. 1996). The Administrative Law Judge erred in concluding that the clear and convincing standard of proof applied to both the effort to impose an administrative fine and the effort to compel **G & J** to perform mitigation.

While the administrative fine imposed in this case may necessitate application of the clear and convincing standard of proof, the standard of proof to be applied is not an issue in this case and no district court of appeal has decided the issue. However, the proper application and interpretation of Section 479.106, Florida Statutes, are not affected by the application of the clear and convincing standard of proof.

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

The **DEPARTMENT'S** fifth exception is to certain findings and conclusions in Conclusion of Law No. 16, which contains the following statements:

> The Department has not met its burden of proving that Respondent constitutes a "person benefiting from" the vegetation cut. The cut took place around October 2000. The subject board has not been rented to an advertiser and Respondent is not actively marketing the subject board for advertising purposes. Further, there is no evidence that the permit has been traded or that the sign being more visible somehow enhances Respondent's prospective ability to trade its permit.

The **DEPARTMENT** reiterates its position that the fact **G & J** is not actively marketing the subject board for advertising purposes is not supported by competent, substantial evidence, and that the conclusion that **G & J** is not a person benefitting from the illegal cut is erroneous. Finding of Fact No. 3 specifically finds that the illegal cutting improved the visibility of the

subject sign from Interstate 75. The **DEPARTMENT** presented uncontradicted evidence that the illegal cutting took place in the area used by outdoor advertising companies to create view zones for signs. **G & J** owns the subject sign and the illegal cutting made the sign more visible from the highway in a material and useful way. **G & J** benefitted from the removal of the trees within the plain meaning of the statute. Any reasonable person understands that an outdoor advertising sign along a highway needs to be visible from the road because the ability to be seen is the fundamental purpose for such signs. This sign was not visible from Interstate 75 before the cut. A number of very large trees were removed creating a view zone for the sign from Interstate 75. **G & J** benefitted from the cut because its sign became visible from the highway.

Section 479.106, Florida Statutes, imposes liability on persons benefitting from the illegal removal of vegetation. There is no reason not to give the statute its plain and obvious meaning. See McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla.1998). No reasonable person could conclude that the owner of an outdoor advertising sign does not benefit from making a sign visible to passing motorists. The Administrative Law Judge erroneously created an additional requirement of benefit by requiring proof of a specific financial or business benefit to the outdoor advertiser whose sign was made visible by illegal cutting.

The **DEPARTMENT** claims that this is not a close case where some cutting occurred that may have made a sign incrementally more visible. This sign was obscured by large trees and vegetation. The trees and vegetation were removed from a wide swath in front of the sign making it clearly visible from the highway. In Finding of Fact No. 2, the Administrative Law Judge found that the "vegetation removal included the removal of many large trees," and that

the sign had "previously been screened from sight" and "could now be seen from the highway." This is the most fundamental benefit that can inure to the owner of an outdoor advertising sign from the removal of trees and vegetation.

G & J'S efforts to disclaim the obvious benefit flowing to it from clearing the trees and vegetation obscuring its sign are legally insufficient. **G & J** argued that it received no benefit because it was not using the sign for advertising purposes. This argument improperly ignores the obvious benefit obtained from having the sign visible from the road. This argument also fails even under the analysis urged by **G & J** and followed by the Administrative Law Judge. The Administrative Law Judge erroneously found that the sign was not being marketed for advertising. That finding is unsupported and must be rejected. The Administrative Law Judge properly found that the sign displayed a message seeking advertisers for the sign, which constitutes a finding that **G & J** was marketing the sign. The **DEPARTMENT** contends that this establishes a "benefit" from the cut even under the Administrative Law Judge's erroneous test, and the findings and conclusions in Conclusion of Law No. 16 should be rejected.

In enacting Section 479.106, Florida Statutes, the legislature identified two distinct groups of persons who are subject to its provisions and penalty:

> any person engaging in removal, cutting, or trimming of trees or vegetation in violation of this section or benefiting from such actions shall be subject to an administrative penalty . . . . (emphasis added).

Thus, in order for its notice of unpermitted vegetation removal to **G & J** to be upheld as valid, the **DEPARTMENT** would have to establish only that **G & J** removed, cut, or trimmed the subject trees or vegetation or that **G & J** benefitted from the removal, cutting, or trimming. §

479.106(7), Fla. Stat. There is, admittedly, no direct evidence of who performed the subject illegal removal, cutting, or trimming of all of the vegetation and trees from the **DEPARTMENT'S** right of way in the view zone of **G & J'S** sign. However, in order to prevail, the **DEPARTMENT** could still establish that **G & J** benefitted from the illegal cutting and the **DEPARTMENT** did. A plain reading of Section 479.106, Florida Statutes, establishes the error in the Administrative Law Judge's legal conclusion that **G & J** did not benefit from the illegal cutting.

As ably and often stated by appellate courts of this state,

> It is, of course, a basic rule of statutory construction that words of common usage, when used in an enactment, should be used in their plain and ordinary sense

Freedman v. State Bd. of Accountancy, 370 So. 2d 1168, 1169 (Fla. 4th DCA 1979) cited in Doyle v. Dep't of Bus. Reg., 26 Fla. L. Weekly D2183 (Fla. 1st DCA Sept. 6, 2001). According to THE AMERICAN HERITAGE DICTIONARY 171 (2d college ed. 1982) , "benefit" means

> 1. Something that promotes or enhances well-being; advantage; . . . To be helpful or useful to . . . To gain advantage; profit . . . .

Thus, in order to prevail, the **DEPARTMENT** had to establish only that after the illegal cutting, the subject sign was enhanced or obtained an advantage beyond that which it enjoyed prior to the illegal cutting. The sign was irrefutably not visible before the cutting, but visible after the cutting. (T. 22)(RO. 3)

The totality of the evidence and the Administrative Law Judge's findings support the conclusion that the subject sign did, undeniably, benefit from the illegal removal of the

vegetation and trees previously obscuring it. The testimony of Mr. Moriaty, the **DEPARTMENT'S** district seven maintenance roadside vegetation coordinator, is unrefuted that the right of way in front of the subject sign, prior to the illegal cutting, was "forested," and that prior to the illegal cutting "The sign was not visible." (T. 22) In addition, the record is unrefuted that before the illegal cutting there was no ad copy on the sign - because copy would not be visible. (Petitioner's exhibits 1, 3) Similarly unrefuted is the fact that only after the illegal cutting is performed and the sign is visible, does ad copy appear on the subject sign. (Petitioner's exhibits 1, 3)(T. 29) This record evidence is also supported by the Administrative Law Judge's finding that prior to the illegal cutting the sign had been "screened from sight," that after the illegal cutting the sign "could now be seen from the highway," and the illegal cutting "improved the view[3] of the sign from Interstate 75." (RO. 2, 3) The remainder of Finding of Fact No. 3, to wit, "although it is not clear from the record whether it was the trees or the surrounding vegetation which obscured the sign" is irrelevant because the statute does not differentiate between vegetation and trees - a permit is required prior to the removal of either and without a permit, the removal of either or both is illegal. (RO. 3) § 479.106, Fla. Stat.

It is well documented and settled in Florida law that state agencies have broad discretion and deference is accorded an agency in the interpretation of a statute which it

---

[3] The Administrative Law Judge uses the word "view" in this regard, but clearly it is the sign's visibility that was improved and not its view. See Department of Transp. v. Suit City of Aventura, 774 So. 2d 9, 13 (Fla. 3d DCA 1999), rev. denied Prudential Ins. Co. of America v. Florida Dep't of Transp., 796 So. 2d 537 (Fla. 2001) (discussing the loss of visibility of a premises to passing motorists, versus a property owner's loss of view from his/her property).

administers, Public Employees Relations Comm'n v. Dade County Police Benevolent Ass'n, 467 So. 2d 987 (Fla. 1985), and that such an interpretation should be upheld when it is within the range of permissible interpretations, Board of Trustees of Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359 (Fla. lst DCA 1995). See also Board of Podiatric Medicine v. Florida Medical Ass'n, 779 So. 2d 658 (Fla. 1st DCA 2001). "Further, an agency is afforded wide discretion in the interpretation of a statute which it is given the power and duty to administer. Its construction of the statute will not be overturned on appeal unless it is clearly erroneous. A reviewing court must defer to any statutory interpretation by an agency which is within the range of possible and reasonable." Republic Media, Inc. v. Dep't of Transp., 714 So. 2d 1203, (Fla. 5th DCA 1998)(citing Atlantic Outdoor Advertising v. Florida Dep't of Transp., 518 So. 2d 384, 386 (Fla. 1st DCA 1987) and Natelson v. Dep't of Ins., 454 So. 2d 31 (Fla. 1st DCA 1984)). In reviewing the **DEPARTMENT'S** interpretation of the visibility of a sign in another context under Chapter 479, Florida Statutes, the First District Court of Appeal previously held: "We affirm FDOT's interpretation of the statutes. . . . FDOT's interpretation of this statute is well within this range." Republic Media, 714 So. 2d at 1205.

Despite the unrefuted evidence and findings of the Administrative Law Judge that the sign was not visible prior to the illegal cutting, that the sign was visible after the illegal cutting, and the finding that the illegal cutting improved the visibility[4] of the sign, the Administrative Law Judge concludes that **G & J** did not benefit from the illegal cutting.

The Administrative Law Judge appears to base this erroneous conclusion on Mr.

---

[4] The Administrative Law Judge uses the word "view" in this regard, but clearly it is the sign's visibility that was improved and not its view. See footnote 3, supra.

Sullivan's testimony that he never rented the subject sign to an advertiser and he did not actively market the subject sign for advertising purposes. (RO. 16) This conclusion also ignores the competent, substantial evidence to the contrary and the evidence that outdoor advertising is **G & J'S** only business and Mr. Sullivan's admission that the outdoor advertising companies will not sell signs to him for his "thing." (T. 71, 62) Moreover, Mr. Sullivan testified only that he neither rented the sign nor marketed the sign, and admitted that he only saw the sign when it was purchased and that all work on the signs including matters of copy are left to his partner, Mr. Gunter. (T. 63-64, 71-72)(RO. 9) If renting the sign or marketing the sign was relevant to the legal issue presented in this case, testimony of Mr. Gunter would have been required. Mr. Sullivan testified only as to his own personal knowledge, of which he had none because he leaves such matters regarding the sign to Mr. Gunter.

Whether the sign was ever rented or actively marketed is not relevant because the law does not require a sign to be rented or marketed in order to establish benefit under Section 479.106, Florida Statutes. Imposing a requirement that a sign must be rented or actively marketed for rent before it can benefit from enhanced visibility is tantamount to adding words to the statute, which the Administrative Law Judge is without authority to do.

> The legislature is assumed to have expressed its intent through the words found in the statute. If the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving construction or speculating as to what the legislature intended. If the statute is clear and unambiguous, the court is not free to add words to steer it to a meaning which its plain wording does not supply. The court is also not free to edit statutes or to add requirements that the legislature did not include.

Nationwide Mut. Fire Ins. Co. v. Southeast Diagnostics, Inc., 766 So. 2d 229, 231 (Fla. 4th

DCA 2000) (citing Zuckerman v. Alter, 615 So. 2d 661, 663 (Fla.1993); James Talcott, Inc. v. Bank of Miami Beach, 143 So. 2d 657, 659 (Fla. 3d DCA 1962); and Meyer v. Caruso, 731 So. 2d 118, 126 (Fla. 4th DCA 1999)).

There are, of course, exceptions to the general rule regarding the breadth of agency discretion and deference to agency interpretations of statutes which they administer. However, cases such as those stating that applying the rule of statutory construction that gives words of common usage their plain and ordinary meaning does not require any particular agency expertise, do not apply in this instance. See, e.g., Doyle, 26 Fla. L. Weekly at D2184; Board of Optometry v. Fla. Society of Ophthalmology, 538 So. 2d 838, 886 (Fla. 1st DCA 1988). In this case, the Administrative Law Judge failed to apply the statute as written and failed to give any logical or reasonable meaning to the word benefit and added criteria to the statutory requirements.

According to the Administrative Law Judge, **G & J** did not benefit from the illegal cutting, apparently because there was no evidence that the sign was ever rented or marketed. These findings are contradicted by the Administrative Law Judge's specific findings that the sign was not visible before the illegal cutting, the sign was visible after the illegal cutting, and the sign's view was improved by the illegal cutting. (RO. 2, 3) Section 479.01(17), Florida Statutes, defines a sign as "any combination of structure and message in the form of an outdoor sign . . . **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) Under Chapter 479, Florida Statutes, it does not matter that a sign may be subjectively intended to be used for something else if it was built or designed to inform. It is

not disputed that the subject sign satisfies the statutory definition of a sign and the subjective intent of Mr. Sullivan or **G & J** regarding the sign is irrelevant. It is undisputed and specifically found by the Administrative Law Judge that before the illegal cutting the sign was not visible from the main-traveled way and after the illegal cutting the sign was visible from the main-traveled way. It is, therefore, an irrefutable conclusion that **G & J'S** sign is designed to, is capable of, and, in fact did present advertising messages or informative content to motorists traveling Interstate 75. The fact that there was no written message on the sign until after the illegal cutting also establishes the benefit to **G & J**. The lack of a written message for a period of time did not transform the sign into something other than a sign. See Republic Media, 714 So. 2d 1203 (upholding the Department's interpretations of Chapter 479, Florida Statutes, and concluding that the definition of a "visible sign" does not equate with being a sign being "readable").

The totality of the evidence and the law support the legal conclusion that **G & J** benefitted from the illegal cutting as contemplated by Section 4179.106, Florida Statutes, and the Administrative Law Judge's conclusion otherwise is erroneous as a matter of law.

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

The **DEPARTMENT'S** sixth exception is to certain findings of fact and conclusions of law in Finding of Fact No. 11, which contains the following statement:

> The Department conceded that permits are required in either case and there is no distinction between permits that are required for the removal of vegetation or the removal of trees.

The **DEPARTMENT** argues that this statement is not supported by competent, substantial evidence and is an erroneous statement of the applicable law because the **DEPARTMENT'S**

rule on vegetation management permits does draw an important distinction between the mowing and removal of non-woody brush and tree cutting. "Mitigation is not required where small trees and herbaceous plants, that upon their maturity will not be large enough to interfere with the visibility of displays in specific on-site situations within the vegetation management zone, are managed to maintain their natural appearance and habit of growth." See Fla. Admin. Code R. 14-40.030(2)(c). "Mitigation is not required for vegetation that the Department normally cuts or removes pursuant to its regular maintenance of the Department's right of way." See Fla. Admin. Code R. 14-40.030(2)(h)1.

The **DEPARTMENT** argues that the record reflects, and the Administrative Law Judge properly found in Conclusion of Law No. 17, that there was not sufficient evidence to conclude that the **DEPARTMENT'S** action with respect to the other circumstances was inconsistent with its action against **G & J**. The other six sites involved mowing of herbaceous plants similar to that performed by the **DEPARTMENT**, and not the removal of large trees. The Administrative Law Judge's conclusion that there is no distinction between these types of cuts is not supported by the record or the applicable law.

The **DEPARTMENT'S** exception to Finding of Fact No. 11 challenges the Administrative Law Judge's conclusion regarding the removal of vegetation versus the removal of trees from the **DEPARTMENT'S** right of way. In this regard, the Administrative Law Judge improperly expanded what she perceived as the **DEPARTMENT'S** concession on this point. As explained at the hearing and in the **DEPARTMENT'S** exception, Rule 14-40, Florida Administrative Code, draws no distinction between vegetation removal permits and tree removal permits; removal of either or both requires a permit from the **DEPARTMENT**.

However, a distinction is made in terms of mitigation because, while the **DEPARTMENT** does not require mitigation for the removal of small herbaceous type plant material, mitigation is required when trees are removed. Fla. Admin. Code. R. 14-40.030(2)(c) and (h)1.

Although included as a finding of fact, this finding is, in fact, a conclusion of law. In addition, the Administrative Law Judge's conclusion in this regard misconstrues the record evidence, ignores the express language of the rule, and fails to give any deference to the **DEPARTMENT'S** enforcement and interpretation of its own rules. Because an agency is entitled to great deference in interpreting and applying its own rules, the Administrative Law Judge's contrary interpretations cannot stand unless the **DEPARTMENT'S** construction is shown to be clearly erroneous or unreasonable. Legal Envtl. Assistance Found., Inc. v. Board of County Comm'rs, 642 So. 2d 1081, 1083-1084 (Fla. 1994); Motel 6, Operating L. P. v. Dep't of Business Reg., 560 So. 2d 1322 (Fla. 1st DCA 1996). In fact, even if an agency's interpretation of its own regulations is only one of several reasonable alternatives, it must stand even though it may not appear to be the most reasonable of the alternatives. Expedient Services, Inc. v. Weaver, 614 F.2d 56 (5th Cir. 1980). No such proof of a more reasonable interpretation or application was offered, no such findings were made, and no such conclusion was reached. As such, the Administrative Law Judge's interpretation and conclusion in this regard cannot stand.

It is clear that this sentence of Finding of Fact No. 11 is a conclusion of law. The **DEPARTMENT'S** rejection of this single sentence is not tantamount to "[a]n agency circumvent[ing] the requirements of the statute by characterizing findings of fact as legal conclusions." Goin v. Comm'n on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995)

(quoting Department of Labor & Employ. Sec. v. Little, 588 So. 2d 281, 282 (Fla. 1st DCA 1991).

The **DEPARTMENT'S** sixth exception is accepted and the last sentence of Finding of Fact No. 11, which constitutes a conclusion of law regarding interpretation and application of the **DEPARTMENT'S** rules, 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 through 10 are supported by competent, substantial evidence. As such, they are adopted and incorporated as if fully set forth herein.

2. The last sentence of Finding of Fact No. 11 regarding the interpretation and application of the **DEPARTMENT'S** rules is rejected as an impermissible conclusion of law concerning rules over which the **DEPARTMENT** has substantive jurisdiction. Finding of Fact No. 11 is otherwise adopted and incorporated as if fully set forth herein.

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 12 through 15 and 17 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 16 are rejected as not supported in the law.

ORDER

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

ORDERED that the Administrative Law Judge's Recommended Order is adopted to the extent hereinabove noted. It is further

ORDERED that the recommendation of the Administrative Law Judge in the Recommended Order is rejected. It is further

ORDERED that the Notice of Unpermitted Vegetation Removal issued to **Respondent, G & J MANAGEMENT COMPANY**, on January 16, 2001, for the unpermitted removal of vegetation at the site of the subject sign is hereby affirmed and the **Petitioner, DEPARTMENT OF TRANSPORTATION**, shall proceed with the assessment and levy of the appropriate penalty and mitigation against **Respondent, G & J MANAGEMENT COMPANY**.

DONE AND ORDERED this 22nd day of January, 2002.

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

FILED D.O.T. CLERK
2002 JAN 22 PM 2:01

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:

Robert M. Burdick, Esquire
Assistant General Counsel
Department of Transportation
Haydon Burns Building
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

The Honorable Barbara J. Staros
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550

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

Susan Rosetti
District Right of Way Administrator
Department of Transportation
11201 North McKinley Drive
Tampa, Florida 33612-6456

Juanice Hagan
Deputy State Right of Way Manager
Department of Transportation
605 Suwannee Street, M.S. 22
Tallahassee, Florida 32399