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

CITY INN HOTEL,

Petitioner,

vs.

DOAH CASE NO.: 06-3683
DOT CASE NO.: 05-396

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

FINAL ORDER

City Inn Hotel was issued a Notice of Violation - Illegally Erected Sign, Notice No. 100505La on October 5, 2005. An Amended Notice of Violation - Illegally Erected Sign was issued to Malibu Lodging Investments, LLC, d/b/a City Inn Hotel (Malibu Lodging Investments/ City Inn Hotel), on June 23, 2006. The notices alleged that the outdoor advertising signs on a building located at 660 Northwest 81st Street, Miami, Florida, which Malibu Lodging Investments/City Inn Hotel "owned, maintained, or operated," were not permitted and were in violation of Section 479.07(1), Florida Statutes (2006). City Inn filed a timely request for a formal administrative hearing and the matter was referred to the Division of Administrative Hearings (DOAH). An administrative hearing was held via teleconference in Tallahassee and

Miami, Florida, on June 5, 2007, before Patricia M. Hart, Administrative Law Judge. Appearances on behalf of the parties were as follows:

For Petitioner: Daniel Alter, Esquire
Gray Robinson, P.A.
Los Olas City Centre
401 East Las Olas Boulevard, Suite 1850
Fort Lauderdale, Florida 33301

For Respondent: Susan Schwartz, Esquire
Assistant General Counsel
Department of Transportation
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

City Inn presented the testimony of Judah Burstyn. The Department presented the testimony of Lynn Holschuh, Mark Johnson, and John Garner. Joint Exhibits 1 through 15 were received into evidence. Official recognition was taken of 2007 Florida Law HB 985, Sections 61 through 64. The transcript of the hearing was filed July 24, 2007. The Department filed its proposed recommended order on August 24, 2007, and City Inn filed its proposed recommended order on August 29, 2007. The recommended order was filed on September 28, 2007. City Inn filed exceptions to the recommended order on October 15, 2007, and the Department filed its response to the exceptions on October 25, 2007.

STATEMENT OF THE ISSUE

The issue in this matter is "[w]hether the Petitioner displayed illegally erected signs, as set forth in the Amended Notice of Violation - Illegally Erected Sign dated June 23, 2006."

EXCEPTIONS TO THE RECOMMENDED ORDER

City Inn takes exception to paragraphs 16, 17, and 19 of the Findings of Fact in the Recommended Order.

Pursuant to Section 120.57(1)(l), Florida Statutes, an agency has the authority to reject or modify the findings of fact set out in the recommended order. However, it cannot do so unless the agency first determines from a review of the entire record, and states with particularity in its final order, that the findings of fact were not based upon competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Rogers v. Dep't of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005). The agency is not permitted to reweigh the evidence or judge the credibility of the witnesses. Id. If there is competent, substantial evidence in the record to support the administrative law judge's findings of fact, the agency may not reject them, modify them, or make new findings. Stokes v. State, Bd. of Prof'l Eng'rs, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007); Rogers, 920 So. 2d at 30.

City Inn's first exception is directed to paragraph 16 of the Findings of Fact where the Administrative Law Judge found that: "The wall murals do not advertise In Plain Sight Media or the City Inn Hotel, nor do they identify any merchandise or service offered as part of the principal business activity of either In Plain Sight Media or the City Inn Hotel." Although the name of In Plain Sight Media does not appear anywhere on the murals, City Inn contends that the murals alone stand as examples of the services offered by In Plain Sight which are available through its office located in the hotel. The record evidence establishes that the murals consist entirely of brand name advertising with no reference to either City Inn or In Plain Sight Media. City Inn's exception to paragraph 16 of the Findings of Fact is rejected.

City Inn next takes exception to paragraph 17 of the Findings of Fact claiming that there is no factual predicate to support any finding that any portion of the monthly rental fee under the March 1, 2007, Lease Agreement is attributable to the use of the building's exterior wall space.

City Inn is mistaken. In addition to record testimony indicating that the Lease Agreement took into account some on-site signage and use of as much wall space as In Plain Sight Media needed, the Lease Agreement specifically provides that the tenant, In Plain Sight Media, "may place advertising signage on the Landlords [sic] promises [sic] at Tenant's discretion." City Inn's exception to paragraph 17 of the Findings of Fact is rejected.

City Inn's last exception to the Findings of Fact is directed to paragraph 19 on the ground that it understates and fails to capture the most salient aspect of the testimony concerning the Department's withdrawal of a notice of violation for the "Continuum II" wall mural. Paragraph 19 as stated is supported by competent, substantial evidence. The Department cannot make additional, supplemental findings. Stokes, 952 So. 2d at 1225; Rogers, 920 So. 2d at 30. City Inn's exception to paragraph 19 of the Findings of Fact is rejected.

Turning to the Conclusions of Law in the Recommended Order, City Inn takes exception to paragraphs 24, 28, 29, and 30.

Regarding an agency's treatment of conclusions of law, Section 120.57(1)(l), Florida Statutes provides:

> 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.

City Inn's first exception to the Conclusions of Law is directed to paragraph 24, note 3, where the Administrative Law Judge did not accept City Inn's argument that the 2007 amendment to Section 479.01, Florida Statutes, to include a definition of "wall mural" indicates that prior to the amendment a wall mural was not within the regulatory purview of Chapter 479. In Eller Media Company v. Department of Transportation, DOAH Case No. 00-1521 (DOT Final Order June 1, 2001), the Department concluded that a 100 foot x 60 foot mural made out of a canvas type material attached to the north wall of a building was a sign as contemplated by Chapter 479, Florida Statutes. The Administrative Law Judge's refusal to adopt City Inn's argument is consistent with the Department's interpretation and application of Chapter 479, Florida Statutes, and will not be set aside. City Inn's exception to paragraph 24, note 3, of the Conclusions of Law is rejected.

In paragraph 28 of the Conclusions of Law, the Administrative Law Judge concluded that City Inn had failed to carry its burden of proving that the wall murals advertising Volkswagen automobiles and Vitamin Water fall within the exemption set out in Section 479.16(1), Florida Statutes. Specifically, the Administrative Law Judge stated:

> Volkswagen automobiles and Vitamin Water are neither principal nor accessory products or services "sold, produced, manufactured, or furnished" on the premises of the City Inn Hotel but are, at best, products incidental to the principal business activity of these companies. The facts that, from time to time, Volkswagen automobiles are available for sale or rent on the used car lot owned by Malibu Lodging Investments/City Inn Hotel; that Vitamin Water is sold from a vending machine in the City Inn Hotel; and that the wall murals have generated interest in the advertising services provided by In Plain Sight Media and have increased the foot-traffic in the City Inn Hotel are not sufficient to establish that these wall murals advertise products or services that are the principal business

> activity of Malibu Lodging Investments/City Inn Hotel or In Plain Sight Media.

Looking to the last sentence quoted above, City Inn takes exception to paragraph 28 arguing that the Administrative Law Judge applied the incorrect standard for purposes of determining whether or not the wall murals qualified for the Section 479.16(1) exemption. City Inn's complaint is based upon its contention that "the statute is phrased in terms which require *either* that the mural 'consist primarily of the name of the establishment' *or* 'the principal **or** accessory merchandise, services, activities or entertainment sold, produced, manufactured or furnished on the premises of the establishment....'" [All emphasis original] City Inn's position is not well taken.

Inasmuch as there is no dispute that the wall murals do not consist primarily of the name of the establishment, the Administrative Law Judge applied the correct standard in the first sentence quoted above when she concluded that Volkswagen automobiles and Vitamin Water are **neither** principal **nor** accessory products or services sold, produced, manufactured, or furnished on the premises of the City Inn Hotel. The last sentence in the quote, which City Inn focuses on, speaks to the portion of Section 479.16(1) which disallows an exemption where, as here, the signs consist principally of brand name or trade name advertising and the merchandise or service is only incidental to the principal activity.

City Inn also takes issue with paragraph 28 because of the lack of statutory criteria for determining when merchandise or a service is incidental to the principal activity of the establishment where the sign is located. City Inn views this lack of criteria as creating an

ambiguity in the statute which must be construed in its favor. City Inn is mistaken. As the Department stated in its Response to City Inn Hotel's Exceptions:

> Moreover, the term "incidental" is not ambiguous simply because it is not defined by statute or rule. Words of common usage should generally be given their natural, plain ordinary meanings, unless they are used in a technical sense. See, State v. Brown, 412 So. 2d 426, 428 (Fla. 4th DCA 1982). When asked how the Department's [sic] interprets the word "incidental," John Garner, the Department's manager of production and program operations for the office of right of way stated: "That it's a small part. The term incidental has an obvious meaning. The dictionary will give you a definition of it. It's not the primary - - it's incidental. It's one small part of the services." (Tr.p. 88, lines 11-14) Webster's dictionary defines incidental as: (1) happening or likely to happen as a result of or in connection with something more important; being an incident; casual; hence, 2. secondary or minor, but usually associated as, the *incidental* cost of education. Webster's New World Dictionary of the American Language, (College Edition 1960)
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> The Department's plain language definition of the word incidental is further supported by the opinion in Florida Hotel and Motel Association, Inc., V. State, Department of Revenue, 635 So.2d 1044 (Fla. 1st DCA 1994), which held that a hotel's sale of hard goods and consumables was "in reality, nothing more than amenities incidental to the business." Similarly, Petitioner's occasional sale of water from a vending machine and even rarer sales of Volkswagens at a car lot next door are properly considered incidental to Petitioner's business....

City Inn's exception to paragraph 28 of the Conclusions of Law is rejected.

City Inn next takes exception to paragraph 29 of the Conclusions of Law claiming that it is grounded upon an inappropriate inference that a portion of the rent paid by In Plain Sight Media is attributable to the use of the exterior of City Inn's building to display the wall murals. As set out in the disposition of City Inn's exception to paragraph 17 of the Findings of Fact, the record

testimony as well as the language of the lease document provide the requisite support for this inference. City Inn's exception to paragraph 29 of the Conclusions of Law is rejected.

Finally, City Inn takes exception to paragraph 30 of the Conclusions of Law where the Administrative Law Judge determined that the wall murals at issue could not qualify for the exemption set out in Section 479.105(1)(e), Florida Statutes, because there was no showing that mall murals had been continuously maintained on the exterior walls of the City Inn Hotel for the past seven years. City Inn contends that this conclusion is at odds with paragraph 18 of the Findings of Fact which states that: "Wall murals have been attached to the exterior walls of the City Inn Hotel since at least the early 1990's." The Administrative Law Judge's finding that murals have been attached to the building since the early 1990's is not inconsistent with the conclusion that City Inn failed to show that wall murals had been **continuously maintained** for the past seven years. In any event, the record contains no showing that the wall murals at issue satisfied all of the criteria set out in Section 479.105(1)(e), Florida Statutes. Indeed, such a showing could not be made for at least two reasons.

First, Section 479.105(1)(e)2, Florida Statutes, requires a showing that the sign would have met the criteria established in Chapter 479 for the issuance of a permit. When counsel for the Department sought to elicit testimony on whether the wall murals would be eligible to receive a permit, counsel for City Inn objected on the ground that he did not "want a record created on this case on the propriety or guessing about the results of a permit application that's not before the Court and it has never been presented to the Department." The Department withdrew the question and the objection was sustained.

Second, the murals could not be permitted because their dimensions are approximately 60 feet by 65 feet (uncontested Finding of Fact, paragraph 9), and, therefore, far exceed the 950 square foot maximum area provided for in Section 479.07(9)(b)3, Florida Statutes. City Inn's exception to paragraph 30 of the Conclusions of Law is rejected.

FINDINGS OF FACT

After review of the record in its entirety, it is determined that the Findings of Fact in paragraphs 1 through 19 of the Recommended Order are supported by competent, substantial evidence and are adopted and incorporated as if fully set forth herein.

CONCLUSIONS OF LAW

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

2. The Conclusions of Law in paragraphs 20 through 30 of the Recommended Order are wholly 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 Malibu Lodging Investments, LLC, d/b/a City Inn Hotel, shall remove the wall murals attached to the exterior walls of the City Inn Hotel property identified in the Department of Transportation's Notice of Violation - Illegally Erected Sign and Amended Notice of Violation - Illegally Erected Sign, Notice No. 100505La, within 30 days of this final order. It is further

ORDERED that should Malibu Lodging Investments, LLC, d/b/a City Inn Hotel, fail to remove the murals, the Department of Transportation, or its contractor, will remove the murals without further notice and the cost of removal is hereby assessed against Malibu Lodging Investments, LLC, d/b/a City Inn Hotel, pursuant to Section 479.07(8)(d), Florida Statutes.

DONE AND ORDERED this 21st day of December, 2007.

SCKopel

Stephanie C. Kopelousos
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
2007 DEC 21 PM 2:07

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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