

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY INN HOTEL,)
)
 Petitioner,)
)
 vs.) Case No. 06-3683
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 17, 2007, by video teleconference, with the Petitioner appearing in West Palm Beach, Florida, and the Respondent appearing in Tallahassee, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Daniel Alter, Esquire
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For Respondent: Susan Swartz, Esquire
Department of Transportation
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STATEMENT OF THE ISSUE

Whether the Petitioner displayed illegally erected signs, as set forth in the Amended Notice of Violation - Illegally Erected Sign dated June 23, 2006.

PRELIMINARY STATEMENT

In an Amended Notice of Violation - Illegally Erected Sign dated June 23, 2006, the Department of Transportation ("Department") notified Malibu Lodging Investments, LLC, d/b/a City Inn Hotel ("Malibu Lodging Investments/City Inn Hotel") that outdoor advertising signs on a building it "owned, maintained, or operated" were displayed without a permit in violation of Section 479.07(1), Florida Statutes (2006)¹ and that the signs were to be removed within 30 days of the date of the notice. Malibu Lodging Investments/City Inn Hotel timely requested an administrative hearing, and the Department forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law judge. After several continuances, the final hearing was held on June 5, 2007.

At the hearing, the Department offered the testimony of Lynn Holschuh, Mark Johnson, and John Garner. Malibu Lodging Investments/City Inn Hotel offered the testimony of Judah Burstyn. Joint Exhibits 1 through 15 were offered and received into evidence. Official recognition was taken of 2007 Florida Laws HB 985, Sections 61 through 64.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on July 24, 2007. After two requests for extensions of time were granted, the parties timely filed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department is the state agency responsible for regulating outdoor advertising and for issuing permits for signs located along interstate and federal aid primary highways pursuant to Chapter 479, Florida Statutes, and Florida Administrative Code Chapter 14-10. See § 479.02, Fla. Stat.

2. Judah Burstyn is the president of Malibu Lodging LLC, which owns the City Inn Hotel, a 200-room hotel located at 660 Northwest 81st Street, Miami, Florida. Mr. Burstyn describes the business of Malibu Lodging Investments/City Inn Hotel as a mixed-used real estate project.

3. Malibu Lodging Investments/City Inn Hotel rents hotel rooms and apartments in the City Inn Hotel property; it rents rooftop space on top of the City Inn Hotel to cellular telephone companies; it owns a used car lot located at 8028 Northwest 6th Court, Miami, Florida, adjacent to the hotel property; it rents

meeting space in the hotel to a church; it rents the hotel banquet room and parking lot for special events; it rents office space and storage space in the City Inn Hotel; and it rents the use of portions of the City Inn Hotel property to tenants and the public for special events.

4. In Plain Sight Media, a Nevada corporation, is principally engaged in the business of advertising and marketing its clients' products. In Plain Sight Media is a full-service media company that, among other things, designs, prints, installs, and removes outdoor advertising for its clients. The outdoor advertising primarily consists of images printed on large sheets of self-adhesive vinyl that are affixed to the exterior walls of buildings. In Plain Sight Media also designs and distributes promotional materials for its clients and assists its clients in direct sales of the clients' products. It does not, however, engage in actual direct sales of its clients' products.

5. Pursuant to a lease executed March 1, 2007, by Malibu Lodging Investments/City Inn Hotel and In Plain Sight Media, In Plain Sight Media leases office and other space in the City Inn Hotel property from Malibu Lodging Investments/City Inn Hotel for rent totaling \$21,750.00 per month. The lease provides that In Plain Sight Media has the right to "place advertising signage on the [City Inn Hotel] premises at [In Plain Sight Media's]

discretion" and that In Plain Sight Media "shall use the Property as a media, marketing and advertising company for products having to do with Volkswagen, Vitamin Water and other clients represented by [In Plain Sight Media], whose clients promotional products and services are available on the [Malibu Lodging Investments/City Inn Hotel] premises."

6. In Plain Sight Media employs an individual who is in the office located in the City Inn Hotel from time to time, on an as-needed basis. She is responsible for answering the telephone, responding to inquiries from the public about the products of In Plain Sight Media's clients, organizing special promotional events, and performing general office work.

7. Malibu Lodging Investments/City Inn Hotel and In Plain Sight Media also executed a Lease Agreement for Wallspace at or about the end of January 2007, in which In Plain Sight Media agreed to pay Malibu Lodging Investments/City Inn Hotel the greater of \$21,750.00 per month or 50 percent of In Plain Sight Media's monthly ad revenue for the right to install and maintain wall signage advertisements or displays on each of the north and south exterior walls of the City Inn Hotel property at 600 Northwest 81st Street in Miami, Florida, for a minimum total monthly rent of \$43,500.00.

8. According to the testimony of Mr. Burstyn and of Marc Caldera, President of In Plain Sight Media, the March 1, 2007,

lease covering office, storage space, and the use of other space in the City Inn Hotel and the adjacent parking lot and used car lot operated to void the Lease Agreement for Wallspace.²

9. On June 23, 2006, when the Amended Notice of Violation - Illegally Erected Sign was issued, large wall murals were attached to the north, east, and south exterior walls of the City Inn Hotel property advertising Heineken beer, Krieger watches, and a "Read to Achieve" program promoted by the Miami Heat basketball team. At the time of the final hearing in this case, these wall murals had been replaced with two larger wall murals on the north and south exterior walls, each approximately 60 feet wide and 65 feet high. One wall mural featured a picture of a Volkswagen automobile with the slogan, "Woe isn't you. Dare to be happy," located on the south exterior wall of the City Inn Hotel, and the other featured a picture of a bottle of Vitamin Water and Shaquille O'Neal with the slogan "diesel power it works . . . for shaq," on the north exterior wall. Both of the banners were created, installed, and maintained by In Plain Sight Media.

10. Guests at the City Inn Hotel sometimes purchase an automobile from the used car lot located adjacent to the City Inn Hotel and owned by Malibu Lodging Investments/City Inn Hotel. Volkswagen automobiles are, from time to time, available for rent or for sale on this car lot.

11. In Plain Sight Media sells Vitamin Water from a vending machine inside the City Inn Hotel property, and Malibu Lodging Investments/City Inn Hotel receives a percentage of the revenue from the vending machine sales. If anyone asks about Vitamin Water at the In Plain Sight Media office in the City Inn Hotel, during the time the office is staffed, information about the product and promotional material is available.

12. The wall murals installed on the north and south exterior walls of the City Inn Hotel property have generated inquiries to In Plain Sight Media from persons interested in its advertising and/or marketing services, and Mr. Burstyn believes that the wall murals have increased foot traffic in the City Inn Hotel.

13. Both of the wall murals installed on the exterior walls of the City Inn Hotel are visible from Interstate 95 and are located within 660 feet of the right-of-way for that federal highway.

14. Neither In Plain Sight Media nor Malibu Lodging Investments/City Inn Hotel has applied to the Department for, or obtained, outdoor advertising permits for these wall murals.

15. The wall murals on the exterior walls of the City Inn Hotel property are signs that advertise Volkswagen automobiles and Vitamin Water. As such, they cannot be displayed without an outdoor advertising permit.

16. 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.

17. There is currently no agreement explicitly giving Malibu Lodging Investments/City Inn Hotel the right to receive rental income attributed to outdoor advertising attached to the exterior walls of the City Inn Hotel. The March 1, 2007, lease gives In Plain Sight Media the right to "place advertising signage" on the City Inn Hotel property, and it is reasonable to infer that a portion of the \$21,750.00 per month rent paid to Malibu Lodging Investments/City Inn Hotel by In Plain Sight Media includes rent for the use of the exterior walls of the City Inn Hotel for advertising signage. This inference is supported by the terms of the lease executed in January 2007, which provided for In Plain Sight Media to pay Malibu Lodging Investments/City Inn Hotel a minimum of \$43,500.00 in rent for nothing more than the right to affix advertising wall murals on the exterior surfaces of the north and south walls of the City Inn Hotel.

18. Wall murals have been attached to the exterior walls of the City Inn Hotel since at least the early 1990's.

19. Malibu Lodging Investments/City Inn Hotel elicited evidence from the Department's witnesses relating to the

withdrawal of a notice of violation for an illegal, unpermitted wall mural advertising "Continuum II." The notice of violation was withdrawn by the Department because it determined that the sign advertised a project that was to be developed on the site where the wall mural was displayed. When the "Continuum II" wall mural was replaced with a wall mural advertising Fiji water, a notice of violation was issued for that unpermitted sign.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).

21. Because the Department has charged Malibu Lodging Investments/City Inn Hotel with maintaining unpermitted and, therefore, illegal signs on its property, it bears the burden of proving by a preponderance of the evidence that the signs are illegal. See Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 788 (Fla. 1st DCA 1981)("In accordance with the general rule, applicable in court proceedings, 'the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.'"); § 120.57(1)(j), Fla. Stat.("Findings of fact shall be based upon a preponderance of the evidence, except in penal

or licensure disciplinary proceedings or except as otherwise provided by statute").

22. Section 479.01, Florida Statutes, contains the following pertinent definitions:

(4) "Controlled area" shall 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 and beyond 660 feet of the nearest edge of the right-of-way of any portion of the State Highway System, interstate, or federal-aid primary system outside an urban area.

* * *

(8) "Highway" means any road, street, or other way open or intended to be opened to the public for travel by motor vehicles.

(9) "Interstate highway system" means the existing, unbuilt, or unopened system of highways or portions thereof designated as the national system of interstate and defense highways by the department.

(11) "Maintain" means to allow to exist.

* * *

(17) "Sign" means any combination of structure and message in the form of an outdoor 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. The term does not include an official traffic control sign, official marker, or specific information panel erected, caused to be erected, or approved by the department.

23. Section 479.07(1), Florida Statutes, provides:

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

24. Based on the findings of fact herein, the Department has proven by a preponderance of the evidence that the wall murals attached to the north and south exterior walls of the City Inn Hotel are signs that are visible from and within 660 feet of a federal interstate highway and that the signs were erected and are maintained without a permit.³

25. Section 479.105, Florida Statutes, provides in pertinent part:

(1) 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 s. 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.

* * *

(e) However, if the sign owner demonstrates to the department that:

1. The sign has been unpermitted, structurally unchanged, and continuously maintained at the same location for a period of 7 years or more;

2. At any time during the period in which the sign has been erected, the sign would have met the criteria established in this chapter for issuance of a permit;

3. The department has not initiated a notice of violation or taken other action to remove the sign during the initial 7-year period described in subparagraph 1.; and

4. The department determines that the sign is not located on state right-of-way and is not a safety hazard,

the sign may be considered a conforming or nonconforming sign and may be issued a permit by the department upon application in accordance with this chapter and payment of a penalty fee of \$300 and all pertinent fees required by this chapter, including annual permit renewal fees payable since the date of the erection of the sign.

26. Section 479.16, Florida Statutes, provides in pertinent part:

The following signs are exempt from the requirement that a permit for a sign be obtained under the provisions of this

chapter but are required to comply with the provisions of s. 479.11(4)-(8):

(1) Signs erected on the premises of an establishment, which signs consist primarily of the name of the establishment or which identify the principal or accessory merchandise, services, activities, or entertainment sold, produced, manufactured, or furnished on the premises of the establishment and which comply with the lighting restrictions under department rule adopted pursuant to s.479.11(5), or signs owned by a municipality or a county located on the premises of such municipality or such county which display information regarding government services, activities, events, or entertainment. . . .

* * *

If a sign located on the premises of an establishment consists principally of brand name or trade name advertising and the merchandise or service is only incidental to the principal activity, or if the owner of the establishment receives rental income from the sign, then the sign is not exempt under this subsection.

27. Malibu Lodging Investments/City Inn Hotel has the burden of proving by a preponderance of the evidence that the wall murals attached to the north and south exterior walls of the City Inn Hotel fall within the exemption set forth in Sections 479.105(1)(e), Florida Statutes, or may be permitted pursuant to Section 479.16(1), Florida Statutes. See Harper v. England, 168 So. 403 (Fla. 1936)(burden is on party seeking exemption from licensing requirement to establish entitlement to such exemption).

28. Based on the findings of fact herein, Malibu Lodging Investments/City Inn Hotel has failed to carry its burden of proving that the wall murals advertising Volkswagen automobiles and Vitamin Water fall within the exemption set forth in Section 479.16(1), Florida Statutes. The principal business activity of In Plain Sight Media is marketing and promotion, including the design, erection, and maintenance of wall murals, and the principal business activity of Malibu Lodging Investments/City Inn Hotel is an income-producing, mixed-use real estate venture. 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.

29. Furthermore, based on the findings of fact herein, it is reasonable to infer that part of the rental income Malibu Lodging Investments/City Inn Hotel receives from In Plain Sight Media is for the right to use the hotel's exterior walls to display wall murals, so the wall murals Malibu Lodging Investments/City Inn Hotel is not entitled to the exemption in Section 479.16(1), Florida Statutes.

30. Finally, based on the findings of fact herein, Malibu Lodging Investments/City Inn Hotel has failed to prove that the wall murals advertising Volkswagen automobiles and Vitamin Water are conforming or nonconforming signs for which a permit may be issued pursuant to Section 479.105(1)(e), Florida Statutes. There was no showing that wall murals have been continuously maintained on the exterior walls of the City Inn Hotel for the past seven years. The wall murals must, therefore, be removed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Transportation issue a final order finding that the wall murals attached to the exterior walls of the City Inn Hotel property violate Section 479.07(1), Florida Statutes, and ordering that the wall murals be removed.

DONE AND ENTERED this 28th day of September, 2007, in
Tallahassee, Leon County, Florida.



PATRICIA M. HART
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of September, 2007.

ENDNOTES

^{1/} All references to the Florida Statutes shall be to the 2006 edition unless otherwise indicated.

^{2/} It is noted that this testimony was not controverted by the Department, but nothing in the March 1, 2007, lease indicated that the Lease Agreement for Wallspace was replaced or rendered void by that subsequent lease, which, on its face, is limited to office space, storage space, and the use of hotel facilities, with an incidental mention of "advertising signage."

^{3/} The Legislature amended Section 479.01, Florida Statutes, effective July 1, 2007, to include a definition of "wall mural," as follows:

(27) "Wall mural" means a sign that is a painting or an artistic work composed of photographs or arrangements of color and that displays a commercial or noncommercial message, relies solely on the side of the building for rigid structural support, and is painted on the building or depicted on vinyl, fabric, or other similarly flexible

material that is held in place flush or flat against the surface of the building. The term excludes a painting or work placed on a structure that is erected for the sole or primary purpose of signage.

Section 479.156, Florida Statutes (2007), effective July 1, 2007, provides that, with some limitations, municipalities and counties may permit wall murals notwithstanding any other provision of Chapter 479, Florida Statutes. Malibu Lodging Investments/City Inn Hotel argues that the wall murals at issue in this case cannot be signs because the Legislature recently added a definition of wall mural, implying, therefore, that wall murals were not previously within the scope of Chapter 479, Florida Statutes. This argument is rejected because the definitions of sign and wall mural are not mutually exclusive.

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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.