

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CENTRAL FLORIDA WETLANDS SOCIETY,)
)
Petitioner,)
)
vs.) CASE NO. 91-6871
)
STATE OF FLORIDA, DEPARTMENT OF)
ENVIRONMENTAL REGULATION and)
KIRKMAN ORLANDO PARTNERS, LP,)
)
Respondents.)
_____)
CITY OF ORLANDO,)
)
Petitioner,)
)
vs.) CASE NO. 91-8017
)
STATE OF FLORIDA, DEPARTMENT OF)
ENVIRONMENTAL REGULATION and)
KIRKMAN ORLANDO PARTNERS, LP,)
)
Respondents.)
_____)
WILLOW KEY ASSOCIATES LIMITED,)
)
Petitioner,)
)
vs.) CASE NO. 91-8018
)
STATE OF FLORIDA, DEPARTMENT OF)
ENVIRONMENTAL REGULATION and)
KIRKMAN ORLANDO PARTNERS, LP,)
)
Respondents.)
_____)

RECOMMENDED ORDER OF DISMISSAL

As addressed in an order dated January 2, 1992, an evidentiary motion hearing was conducted, by telephone, on a motion to dismiss Central Florida Wetlands Society's petition in case number 91-6871, styled above.

Consistent with that order, the parties have filed affidavits and briefs or memoranda on their respective positions. In addition, the City of Orlando and Kirkman Orlando Partners, LP (KOP) have submitted supplemental affidavits. These have been considered in the preparation of this order, and the motions to strike supplemental affidavits by City of Orlando and KOP are each DENIED.

ISSUES

The issue for disposition is whether Central Florida Wetlands Society's petition in case number 91-6871 should be dismissed as requested by Kirkman Orlando Partners, LP (KOP). More specifically, it must be determined whether the Heritage Florida Jewish News is a "newspaper of general circulation", and, if so, whether any circumstances exist that would excuse the Society's failure to file its petition within the 21-day period specified in a notice published in that newspaper.

BACKGROUND MATTERS

As stipulated by the parties, the evidence in this proceeding has been presented primarily by affidavits. Michael Mingea testified on behalf of the Central Florida Wetlands Society, but his testimony was generally argument with regard to the Society's position and restatements of matters presented in his petition and letters. His testimony has been considered, with the affidavits filed by the remaining parties and his letters, furnished to the other parties, have been considered with the remaining parties' briefs and memoranda.

A separate order is being entered this same day with regard to the City of Orlando's motion for extension of time to file petition and Kirkman Orlando Partners LP's motion to dismiss or strike, in DOAH case number 91-8017.

FINDINGS OF FACT

1. On September 13, 1991, Kirkman Orlando Partners LP (KOP) and the Florida Department of Environmental Regulation (DER) entered into a consent order with regard to an enforcement action by the agency involving dredging and filling of wetlands in Orlando, Orange County, Florida.

2. The consent order includes this requirement:

14. Respondent shall publish the following notice in a newspaper of general circulation in Orange County, Florida. The notice shall be published one time only within 10 days after execution of the Consent Order by the Department.

STATE OF FLORIDA DEPARTMENT OF
ENVIRONMENTAL REGULATION
NOTICE OF PROPOSED AGENCY ACTION

The Department of Environmental Regulation gives notice of agency action of entering into a Consent Order with KIRKMAN ORLANDO PARTNERS LP, a/k/a KIRKMAN ORLANDO PARTNERS LTD., pursuant to Rule 17-103.110(3), Florida Administrative Code. The Consent Order addresses the dredging and filling of certain wetlands without a required permit in Sections 6 and 7 of Orange County generally east of Kirkman Road and north of L.B. McLeod Road.

The Consent Order is available for public inspection during normal business hours, 8:00 a.m. to 5:00 p.m., Monday through Friday except legal holidays, at the Department of

Environmental Regulation, Central District Office, 3319 Maguire Boulevard, Suite 232, Orlando, Florida 32803.

Persons whose substantial interests are affected by the above proposed agency action have a right to petition for an administrative determination (hearing) on the proposed action. The Petition must contain the information set forth below and must be filed (received) in the Department's Office of General Counsel, 2600 Blair Stone Road, Tallahassee, Florida 32399-2400, within 21 days of receipt of this notice. A copy of the Petition must also be mailed at the time of filing to the (persons named) above at the address indicated. Failure to file a petition within the 21 days constitutes a waiver of any right such person has to an administrative determination (hearing) pursuant to Section 120.57, F.S.

The petition shall contain the following information:

(a) The name, address, and telephone number of each petitioner; the Department's identification number and the county in which the subject matter or activity is located; (b) A statement of how and when each petitioner received notice of the Department's action or proposed action; (c) A statement of how each petitioner's substantial interests are affected by the Department's action or proposed action; (d) A statement of the material facts disputed by petitioner, if any; (e) A statement of facts which petition contends warrant reversal or modification of the Department's action or proposed action; and (g) A statement of the relief sought by petitioner stating precisely the action petitioner wants the Department to take with respect to the Department's action or proposed action.

If a petition is filed, the administrative hearing process is designed to formulate agency action. Accordingly, the Department's final action may be different from the position taken by it in this Notice. Persons whose substantial interest will be affected by any decision of the Department with regard to the subject agency (proposed) action have the right to petition to become a party to the proceeding. The petition must conform to the requirements specified above and be filed (received) within 21 days of receipt of this notice in the Office of General Counsel at the above address of the Department. Failure to petition within the allowed time frame constitutes a waiver of any right such person has to request a hearing under Section 120.57,

F.S., and to participate as a party to this proceeding. Any subsequent intervention will only be at the approval of the presiding officer upon motion filed.

A party who is adversely affected by this Final Order is entitled to Judicial Review pursuant to Section 120.68, F.S. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the Order to be reviewed.

Respondent shall provide proof of publication to the Department within fourteen (14) days of publication.

(Consent order filed at DOAH
10/29/91. emphasis added)

3. The required notice was published in the September 20, 1991 edition of Heritage Florida Jewish News (Heritage).

The filing deadline was, therefore, Friday, October 11, 1991, 21 days after the notice was published. As reflected above, the notice clearly provides that filing means "received" by the agency and that failure to file constitutes a waiver of right to an administrative hearing.

4. On September 25, 1991, Doug MacLaughlin, Esquire, Counsel for DER, sent a letter to Randall Denker, Esquire stating:

Enclosed as you requested is a copy of the Consent Order as referenced above. Also enclosed is a copy of the public notice published on September 20, 1991, in the Heritage Florida Jewish News, also enclosed.

Note that the published public notice allows affected parties 21 days from September 20 to petition for a hearing. Assuming that this is considered adequate public notice, this 21 day newspaper deadline would apply to any of your clients interested in this matter.

(letter filed at DOAH 1/7/92)

Ms. Denker represents Central Florida Wetlands Society (CFWS) in a civil proceeding related to the activities that are the subject of the consent order.

CFWS received actual notice of the proposed agency action. As stated in Michael Mingea's letter to the hearing officer filed at DOAH on January 6, 1992:

...[W]e feel the decision regarding your ruling on the acceptability of the Heritage

Jewish News is unnecessary because the Society received actual notice of proposed agency action from DER's attorney, Mr. MacLaughlin, stating that we had a certain number of days to submit a Petition for an Administrative Hearing and we submitted a Petition within that time-frame. Therefore, we feel that DER's letter of actual notice supersedes any published notice in the Heritage Jewish News.

5. A petition for formal administrative proceeding, signed and verified by Michael Mingea, President, CFWS, was filed (received) by the DER Office of General Counsel on October 14, 1991.

6. The City of Orlando filed a motion for extension of time to file petition on November 12, 1991.

7. DER's Central District Office in Orlando, the office responsible for administration of the consent order, has taken the position that Heritage is not a newspaper of general circulation. George Gionis, Program Administrator for the Water Management Division in DER's Central District Office has informed KOP of his concern, but no one from DER has insisted or suggested that the notice should be republished in another newspaper in order to comply with the consent order.

8. The Heritage has been published weekly for more than 15 years on a continuous basis. It has a circulation of approximately 3000 on a regular basis, up to approximately 7000 for certain issues. The population of Orange County is approximately 701,000.

The newspaper is entered as second class mailing at the post offices in both Orange and Seminole Counties.

It contains at least 25% of its words in the English language. The four issues filed at the Division of Administrative Hearings, and included as evidence in this proceeding, are dated February 1, 1991; May 10, 1991; June 21, 1991; and September 20, 1991. All of the words in those issues are in English.

9. Substantially less than 50% of the newspaper is devoted to classified advertisements. The classifieds include legal notices from the Ninth (Orange County) and Eighteenth (Seminole County) Judicial Circuits. Legal notices by the Florida Department of Professional Regulation (DPR) are also found in the classified section. (See February 1, 1991 edition containing notices of action by DPR's Board of Funeral Directors and Embalmers, Board of Construction, and Board of Cosmetology.)

10. Even though the newspaper is not sold at any of the three newsstands listed in the yellow pages of the Orlando telephone book, it is offered for sale to the public generally. The newspaper is available for purchase by the public through subscription and at the Jewish Community Center in Maitland and the newspaper office in Fern Park. It is available to the public at the Orlando and Maitland public libraries.

The newspaper's masthead recites:

HERITAGE Florida Jewish News
(ISN 0199-0721) is published weekly for \$22.26
(\$21 plus \$1.26 Fla. sales tax) per year to

Florida addresses (\$25 for the rest of the U.S.) by HERITAGE Central Florida Jewish News, Inc., 207 O'Brien Road, Suite 101, Fern Park, FL 32730. Second-class postage paid at Fern Park and additional mailing offices.

11. The Heritage customarily contains information of a public character or of interest or value to the general public and residents and property owners in Orange and Seminole Counties.

The four editions referenced above include a 12-page fashion section, a 20-page health and fitness section, short articles on central Florida businesses, and articles on elder care and child care. Most of the news articles, local, national and international, relate to Israel or to issues involving Jewish people. For example, the lead headline in the February 1, 1991, edition reads, "Iraqi Missile Attacks have left thousands of Israelis homeless". Another article in that edition reports on U.S. Representative Jim Bacchus' commendation of Israel on the floor of the House. As the attention of the general public was riveted to events in the Persian Gulf in early 1991, it is likely that the same or similar articles appeared in newspapers throughout the state and county.

Examples of front page headlines from other editions include, "Israelis racing against the clock to get remaining Jews out of Ethiopia"; "Congress urged to press Syria to let its 4,000 Jews emigrate"; "Federation allocates \$81,377 to local agencies from 100 Days Combined Jewish Appeal Campaign"; and "Ethiopians adjust to new lifestyle".

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to Section 120.57(1), F.S.

13. DER Rule 17-103.150(3), F.A.C. addresses the notice required for proposed agency action other than on a permit application and is relevant here. It provides, in pertinent part:

(3) The Department or any person whose substantial interests are or may be affected by proposed agency action other than on a permit application may publish or may be required to publish public notice, and provide proof of publication, in a newspaper of general circulation in the county or counties affected by the proposed action. Such public notice shall contain at least the following information and be in substantially the following form:

State of Florida
Department of Environmental
Regulation

Notice of Proposed Agency Action

(a) The type of proposed agency action (e.g., Consent Order);

(b) A description and location of the subject matter or activity covered by the action, the Department's identification number, and the name and address of any person

to whom the action is directed;

(c) The location where complete copies of the document and accompanying material expressing the proposed agency action are available for public inspection; and

(d) Paragraphs which read substantially as follows:

Persons whose substantial interests are affected by the above proposed agency action have a right, pursuant to Section 120.57, F.S., to petition for an administrative determination (hearing) on the proposed action. The petition must contain the information set forth below and must be filed (received) in the Department's Office of General Counsel, 2600 Blair Stone Road, Tallahassee, Florida 32399-2400, within 21 days of publication of this notice. A copy of the Petition must also be mailed at the time of filing to the [persons named] above at the address indicated. Failure to file a petition within 21 days constitutes a waiver of any right such person has to an administrative determination (hearing) pursuant to Section 120.57, F.S.

* * *

14. Rule 17-103.150(2)(c), F.A.C. provides, in pertinent part:

* * *

For the purpose of this rule, "publication in a newspaper of general circulation in the area affected" means publication in a newspaper meeting the requirements of Sections 50.011 and 50.031, F.S., in the county where the activity is to take place.

* * *

15. Section 50.011, F.S., requires the following of a newspaper utilized for legal notices or service by publication:

- a. That it be published and printed weekly or more often;
- b. That it contain at least 25% of its words in the English language;
- c. That it be entered or qualified to be admitted and entered as second class matter at a post office in the county where published;
- d. That it be for sale to the public generally;
- e. That it be available to the public generally for the publication of official or other notices; and
- f. That it contain information of a public character or of interest or of value to the residents or owners of property in the county where published, or of interest or of value to the general public.

Section 50.031, F.S. imposes the additional requirement that the newspaper at the time of publication of the notice shall have been in existence for one year.

16. As found in the recitation of facts above, the Heritage Florida Jewish News meets the requirements of Sections 50.011, F.S., and 50.031, F.S., and therefore meets the requirement of DER's rules.

17. This conclusion is supported by case law exhaustively discussed in Bio-tech Tracking Systems, Inc., v. State of Florida, Department of Environmental Regulation, 13 FALR 2309 (Final Order dated May 17, 1991). In that case, Hearing Officer, P. Michael Ruff found that the Leon County News, a weekly publication printing a mere 100 newspapers a week, available by subscription and at three supermarket newspaper racks in Leon County, was a newspaper of general circulation as provided in DER's Rule and Chapter 50, F.S., for purposes of publication of a notice of intent to issue a permit for expansion of a biomedical waste incinerator in Leon County.

In the face of the Department's exceptions to the recommended order, Secretary Carol Browner adopted the hearing officer's findings of fact and conclusions of law that the Leon County News is a newspaper of general circulation. The Department had argued, as it does here, that the newspaper was not available to the public generally and the intent of Chapters 403 and 120, Florida Statutes could be effectuated only by a broad interpretation of Chapter 50 to require publication in a widely circulated newspaper.

In the absence of a rule or statute, or even case law, the secretary rejected disqualification of a newspaper based on small circulation alone.

Notably, the Legislature in 1991 amended the notice provisions for biohazardous waste facilities by defining "newspaper of general circulation" to mean the newspaper in the county with the largest daily circulation. See Section 403.707, F.S. It did not amend Chapter 50, however.

18. The Department in the instant case argues that not only the circulation but also the content of the Heritage Florida Jewish News should disqualify it. The newspaper, DER claims, is directed essentially to one interest group of the general public.

In State ex rel. Miami Leathercote Company v. Gray, 39 So.2d 716, in 1949 the Florida Supreme Court found The Jewish Floridian was a newspaper of general circulation in Dade County, stating:

* * *

We think the rule is settled in this country that while a newspaper may be devoted primarily to the interests of a special class or group, if it contains news of a general character and interest to the community, even though limited but not negligible in amount, it may qualify as a newspaper of general circulation under the law.

* * *

Several copies of "The Jewish Floridian" are attached to and made a part of the record in this case. They have been examined and we are convinced that much of their contents

would be of interest to the general reading public. There is no question that it is essentially a Jewish publication but in most of the communities of our country the interests of Jews and Gentiles so interfuse and overlap that it would be difficult to point out where the interest of one leaves off and the interest of the other takes up. If a distinction like this has any bearing on the case it would be as reasonable to distinguish between the interests of the Scotch and the Irish.

* * *

Events in the Middle East have made that language all the more relevant today. News affecting or regarding the State of Israel is of far wider interest than solely to persons of the Jewish faith or heritage.

19. Although no single case in the myriad cases discussed in Bio-tech Tracking Systems, supra, or the parties' memoranda, is precisely on point, this general principle still applies: for more stringent publication requirements to be imposed, specific statutory or regulatory direction must be found.

20. The Society makes no argument that the deadline should be tolled, but rather claims that its filing within 21 days of actual notice is sufficient. The actual notice it received (the letter to its attorney) also informed it of the running of the deadline from September 20th.

DER Rule 17-103.155(3)(a), F.A.C. provides that the running of the time for filing a petition for hearing commences from receipt or publication, (whichever occurs first) of notice of the proposed agency action.

Notice to CFWS was unambiguous and clear, and by its failure to timely request an administrative hearing it has waived its right to such hearing.

RECOMMENDATION

Based on the foregoing, it is hereby

RECOMMENDED:

That the Department enter its Final Order dismissing the petition of Central Florida Wetlands Society as untimely.

DONE and RECOMMENDED this 24th day of January, 1992, in Tallahassee, Leon County, Florida.

MARY CLARK, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of January, 1992.

COPIES FURNISHED:

Douglas H. MacLaughlin, Esquire
Dept. of Environmental Regulation
2600 Blair Stone Road
Tallahassee, FL 32399-2400

Charles Tunnickliff, Esquire
Dept. of Professional Regulation
1940 N. Monroe St., Ste. 60
Tallahassee, FL 32399-0740

Debra Braga, Esquire
City of Orlando
400 S. Orange Avenue
Orlando, FL 32801

Michael Mingea
Central Florida Wetlands Society
P.O. Box 690218
Orlando, FL 32896

Nicholas A. Pope, Esquire
Lowndes, Drosdick, et al.
215 N. Eola Drive
Orlando, FL 32801

P. Hugh Trees, Esquire
Robert T. Rosen, Esquire
1051 Winderley Place
Maitland, FL 32751

Carol Browner, Secretary
Dept. of Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, FL 32399-2400

Daniel H. Thompson, General Counsel
Dept. of Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, FL 32399-2400