

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMUNITY AFFAIRS,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 92-6913DRI
)	
GATOR CREEK CAMPGROUND, INC., and)	
POLK COUNTY,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER OF DISMISSAL

When this case was referred to the Division of Administrative Hearings (DOAH), several motions were pending, including:

(1) Gator Creek's Response/Motion to Dismiss Department of Community Affairs' Petition for Appeal of Development Order, arguing essentially:

(a) that the petition was filed against "Gator Creek Campground PUD, Inc.," which does not exist, instead of against "Gator Creek Campground, Inc."

(b) that the appeal was not filed within 45 days of the rendering of the development order in issue, as required by Section 380.07, Fla. Stat. (1991). As to this point, Gator Creek argued that Polk County's approval of Gator Creek's development plans in November, 1991, is the only development order in issue and that the Department's appeal petition does not address that development order, but only addresses the one-year extension granted by Polk County in April, 1992. It argued that the Department's appeal was filed much more than 45 days after the rendition of this approval. Alternatively, it argued that, even if the one-year extension granted by Polk County in April, 1992, were considered to be a development order, the extension was rendered more than 45 days before the Department's appeal was filed.

(c) that the Department's appeal petition does not address Polk County's approval of Gator Creek's development plans in November, 1991, which is the only development order in issue, but only addresses the one-year extension granted by Polk County in April, 1992.

The Department of Community Affairs filed a written response in opposition to this motion, which it later supplemented by the filing of an exhibit.

(2) Gator Creek's Motion to Dismiss for Lack of Jurisdiction, arguing essentially that the Florida Land and Water Adjudicatory Commission (the Commission) exceeded the statutory 60-day time limit for referring the Petition of the Department of Community Affairs for Appeal of Development Order to DOAH set out in Section 120.57(1)(b)3, Fla. Stat. (1991).

(3) Gator Creek's Motion to Dismiss for Violation of Due Process, arguing essentially that the Commission did not properly give notice of the meeting at which it decided to refer the matter to DOAH.

When the case was referred to DOAH, an Initial Order was entered, but no party responded to it. Gator Creek then filed a Motion to Dismiss for Lack of Jurisdiction and Failure to Comply with Hearing Officer's Initial Order. Polk County also filed a Motion to Dismiss, echoing Gator Creek's argument that Polk County's approval of Gator Creek's development plans in November, 1991, is the only development order in issue and that the Department's appeal petition does not address that development order but only the one-year extension.

No further written arguments were filed, and no party complied with or responded to the Initial Order. Finally, the Hearing Officer initiated a telephone prehearing conference, as required by the Initial Order, for purposes of scheduling this case for final hearing. The telephone prehearing conference was held on January 14, 1993. At the conference oral arguments on the pending motions were heard, but the parties were not prepared to fully argue the motions, and they were given until January 29, 1993, to file further written argument on them. To date, Gator Creek and the County have filed further written argument, but the DCA has not.

As for the arguments that the statutory 60-day deadline for Commission referral of matters to DOAH under Section 120.57(1)(b)3, Fla. Stat. (1991), was exceeded, and that the Commission did not properly give Gator Creek notice of the meeting at which it decided to refer the matter to DOAH, the referral to DOAH for purposes of the statutory due process proceedings provided in Section 120.57(1) would remedy any procedural defect.

On the other hand, the requirement under Section 380.07, Fla. Stat. (1991), that appeals from development orders be filed within 45 days of rendition is jurisdictional. Clearly, the Commission no longer would have jurisdiction over a development order approving Gator Creek's development plans rendered in November, 1991. But, if the one-year extension granted by Polk County in April, 1992, is itself a development order, the Department petition and response to the motions to dismiss would raise factual issues as to whether the Department's appeal was filed more than 45 days after the rendition of the extension.

This begs the final question under the Section 380.07 jurisdictional arguments, which also is the question raised under the remaining motions to dismiss--i.e., whether the one-year extension granted by Polk County in April, 1992, is a development order that can be appealed, even if the Department did not timely appeal Polk County's approval of Gator Creek's development plans in November, 1991.

Section 380.031(3), Fla. Stat. (1991), defines "development order" to mean "any order granting, denying, or granting with conditions an application for a development permit." Subsection (4) of the same statute defines "development

permit" to include "any building permit, zoning permit, plat approval, or rezoning, certification, variance, or other action having the effect of permitting development as defined in this chapter." Section 380.04(1), Fla. Stat. (1991), defines "development" to mean "the carrying out of any building activity or mining operations, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels." The statutory definition of a "development order" is therefore quite broad, and it clearly includes Polk County's approval of Gator Creek's development plans in November, 1991. Whether it also includes the one-year extension granted in April, 1992, is another question and requires an examination of the pertinent administrative rules.

F.A.C. Rule 9J-1.002(1) requires that development orders be rendered to the Department and states in part:

Examples of actions for which these sections require issuance and rendition of a development order include, but are not limited to:

- (a) Zoning
- (b) Rezoning
- (c) Special use or special exception
- (d) Variance
- (e) Plat approval
- (f) Major development review
- (g) Community impact assessment
- (h) Building permit
- (i) Fill permit
- (j) Excavation permit
- (k) Landclearing or landscaping permit
- (l) Any change or amendment to a previously issued development order
- (m) Any other action having the effect of permitting development as defined in Section 380.04, F. S.

(Emphasis added.)

It is concluded that, especially in order to be consistent with the statutory definitions, F.A.C. Rule 9J-1.002(1)(m) must refer to relevant changes or amendments. Otherwise, the 45-day deadline in Section 380.07 would be all but meaningless and would not allow a developer to rely on any Department failure to appeal a development order until the final development order. To be relevant, a change or amendment would have to be one that could alter the way in which the Department would review the development.

Generally, a relevant change or amendment to a development order would be one that changes or amends the development project itself in some substantive way. A change or amendment to a development order could be relevant if it alters the project in some significant way, or if it adds elements or details to the project. In addition, if the passage of time results in a relevant change in circumstances that would alter the way in which the Department would review the development, even the mere extension of a construction deadline could constitute a development order. However, regardless of the nature of the change or amendment, the scope of review should be limited to aspects of the development affected by the relevant change or amendment; it should not reopen all aspects of the development for review. In the case of an extension of a

construction deadline, the scope of review should be limited to those aspects of the development affected by the circumstances that changed during the passage of time.

In this case, the Petition of Department of Community Affairs for Appeal of Development Order gives no indication that it seeks a review limited to those aspects of the development affected by circumstances that have changed during the passage of time engendered by the construction deadline extension. To the contrary, it clearly seeks to reopen for review the entirety of the November, 1991, development order which the Department failed to appeal within the 45-day time limit under Section 380.07.

Accordingly, the motions to dismiss filed by Gator Creek and by the County on this ground are granted, and it is recommended that the Florida Land and Water Adjudicatory Commission enter a final order of dismissal.

RECOMMENDED in Tallahassee, Florida, this 3rd day of February, 1993.

J. LAWRENCE JOHNSTON
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 3rd day of February, 1993.

COPIES FURNISHED:

David J. Russ, Esquire
Department of Community Affairs
2740 Centerview Drive
Tallahassee, Florida 32399-2100

Benjamin W. Hardin, Jr., Esquire
Welch & Hardin
Post Office Box 1761
Lakeland, Florida 33802

Timothy F. Campbell, Esquire
Assistant County Attorney
Post Office Box 60
Bartow, Florida 33830

David K. Coburn, Secretary
Fla. Land & Water Adjudicatory Commission
Executive Office of the Governor
Attn: Kelly Tucker
Room 426
311 Carlton Building
Tallahassee, Florida 32301

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit to the Florida Land and Water Adjudicatory Commission written exceptions to this Recommended Order of Dismissal. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the Florida Land and Water Adjudicatory Commission concerning its rules on the deadline for filing exceptions to this Recommended Order of Dismissal.