

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF TRANSPORTATION,)
)
Petitioner,)
)
vs.) CASE NO. 95-1951
)
BLUE CYPRESS GOLF & R.V. RESORT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was held in this case before Patricia Hart Malono, Hearing Officer of the Division of Administrative Hearings, on July 20, 1995, at Okeechobee, Florida.

APPEARANCES

For Petitioner: Francine M. Ffolkes, Esquire
Assistant General Counsel
Department of Transportation
605 Suwannee Street, Mail Station Number 58
Tallahassee, Florida 32399-0458

For Respondent: William H. Curren, Owner
Blue Cypress Golf & R.V. Resort
13801 Highway 441 Southeast
Okeechobee, Florida 34974

STATEMENT OF THE ISSUE

At issue is whether the respondent's access connection to State Road 15 should be closed because its connection permit has expired, it has failed to apply for a new connection permit, and the unpermitted connection causes safety and operational problems on the state highway system.

PRELIMINARY STATEMENT

In a Notice of Permit NonConformance dated March 6, 1995, the petitioner, the Department of Transportation ("Department"), notified the respondent, Blue Cypress Golf & R.V. Resort ("Blue Cypress"), that Connection Permit Number C910193 would expire and become invalid upon its receipt of the notice, as provided in section 335.185, Florida Statutes, and rule 14-96.008, Florida Administrative Code. The grounds stated were that Blue Cypress had not completed the construction required by the permit and that the permit had automatically expired one year after its February 24, 1994, issuance. The notice further provided that Blue Cypress could either apply for a new permit or request an administrative hearing in which to show cause why the unpermitted connection should not be closed. Blue Cypress timely requested a formal hearing pursuant to section 120.57(1), Florida Statutes. The case was referred to the

Division of Administrative Hearings and, by Notice of Hearing dated May 16, 1995, the case was set for hearing on July 20, 1995.

At the hearing, the Department presented the testimony of two witnesses: John W. Berlin, Contracts/Permits Coordinator in the Department's District One, and Michael J. Tako, P.E., Access Management Engineer in the Department's District One. The Department's Exhibits 1 through 16 were accepted into evidence without objection. William H. Curren, one of the owners of Blue Cypress, both represented Blue Cypress and testified on its behalf. Blue Cypress did not offer any exhibits into evidence at the hearing.

At the conclusion of the hearing, the Department stated that a transcript of the proceedings would be filed. Counsel for the Department and Mr. Curren stated they would submit proposed findings of fact and conclusions of law within ten days of the date the transcript was filed. The Department timely filed its Proposed Recommended Order, and Mr. Curren filed a post-hearing submission on behalf of Blue Cypress seven days beyond the deadline. Mr. Curren attached and incorporated into the submission a number of documents which were not offered into evidence at the hearing.

The Department filed a Motion to Strike Blue Cypress's "Recommended Order" and attachments. The grounds given in support of the motion were that the submission was untimely, that a copy was not furnished to the Department, and that documents which are not of record in this case were attached and referred to in the submission. Blue Cypress did not file a response to the motion. Upon consideration of the entire record in this case and of the grounds for the motion, the Department's Motion to Strike the proposed Recommended Order submitted by Blue Cypress is DENIED. It is noted, however, that those documents attached to the submission which were not offered into evidence at the hearing are not part of the record in this case and cannot form the basis for findings of fact.

Rulings on the parties' proposed findings of fact are contained in the appendix to this Recommended Order.

FINDINGS OF FACT

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

1. Blue Cypress Golf & R.V. Resort is located at 13801 Southeast U.S. Highway 441 in Okeechobee County, Florida, about one and one-half miles west of the Martin County line. U.S. Highway 441 is also State Road 15, and Blue Cypress is located on the north side of this two-lane state road. When completed, the resort will have 490 lots; currently, 290 lots have been built, and 200 lots have been sold and are occupied on a seasonal basis. A nine-hole golf course has been in operation at Blue Cypress since at least 1992. Blue Cypress is owned by William H. Curren and his wife.

2. In 1988, Blue Cypress first submitted to the Department an application and plans for a connection permit allowing Blue Cypress to construct a connection with State Road 15 to provide ingress to, and egress from, the property. The plans submitted with the application provided for the construction of a southbound right turn lane, a northbound left turn lane, and an acceleration lane on State Road 15 at the point of connection.

3. In July 1992, while the 1988 application was still under review,^{2/} the Department discovered that Blue Cypress had constructed a 36 to 38 foot asphalt driveway connecting the property to State Road 15. As a result, in August 1992, the Department issued a notice to Blue Cypress that it was in violation of section 335.18, Florida Statutes, because the connection to State Road 15 was unpermitted. Blue Cypress requested an administrative hearing, and the matter was resolved in December 1992 when the Department issued a temporary connection permit allowing Blue Cypress to maintain the connection for ninety days.^{3/} The temporary permit was to expire on March 9, 1993, and Blue Cypress was to submit plans and a new application for a permanent connection permit before that date.

4. Blue Cypress did not submit the required plans prior to the expiration of the temporary permit, and, on March 25, 1993, the Department issued a notice requiring that Blue Cypress comply with the terms of the temporary permit within thirty days. The Department did not receive a timely response, and it entered an Order to Show Cause on June 29, 1993, requiring Blue Cypress to show cause why the connection should not be closed and to submit an application and plans for a connection permit.

5. Blue Cypress timely requested an administrative hearing and also, on August 26, 1993, submitted a second application and plans for a connection permit. After reviewing the plans and the application, the Department issued the permit on February 24, 1994. The proceeding initiated by the June 1993 show cause order was terminated by Final Order entered July 21, 1994, in which Blue Cypress's request for an administrative hearing was dismissed as moot.

6. The connection permit issued on February 24, 1994, number C9101093, provided that construction begin by April 24, 1994, ninety days from the date of issuance, and that construction be complete by February 24, 1995, one year from the date of issuance. The plans submitted by Blue Cypress were modified during the application review process, and the changes were indicated in red ink and incorporated into the permit. Specifically, the approved plans required that a southbound left turn lane be constructed on State Road 15 in accordance with the Department's Standard Index 536, which establishes the geometrics for the road width which must accompany a left turn lane.

7. In concluding that a left turn lane was necessary at the Blue Cypress connection, the Department took into account the projected traffic volumes for 1998 contained in a traffic study commissioned by Blue Cypress, the posted speed limit on State Road 15 of 55 miles per hour, and the projected number of vehicles making a left turn into Blue Cypress. The Department's analysis of the need for a left turn lane was based on the application of generally-accepted standard curves to this information. Standard curves are used to determine whether left turn lanes are required at a connection to ensure safety and the efficient operation of the highway system. The left turn lane required as a condition of the 1994 permit is still needed at the Blue Cypress connection because the Department estimates that traffic volume on State Road 15 in 1995 will be greater than that projected for 1998 in Blue Cypress's traffic study.

8. In a letter dated July 18, 1994, the Department notified Blue Cypress that it had failed to comply with the terms of the connection permit in that it had failed to commence construction of the left turn lane within the ninety-day period specified in the permit. Blue Cypress was directed to submit a revised permit application within thirty days of the date of the letter.

9. In a letter to the Department dated August 3, 1994, Mr. Curren confirmed Blue Cypress's intention to proceed with construction and requested a

ninety-day extension in which to begin construction. The Department granted the extension in a letter dated September 7, 1994, and reminded Blue Cypress that the permit would expire on February 24, 1995, one year after issuance. The next action taken by the Department was to send the March 6, 1995, Notice of Permit Nonconformance which is the subject of this proceeding.

10. Blue Cypress did not request an extension of the permit's expiration date, nor has it begun construction of the left turn lane required by the connection permit. Because the permit expired by its own terms on February 24, 1995, the connection providing access to Blue Cypress is an unpermitted connection to the state highway system. Blue Cypress has not submitted a new application for a connection permit.

11. The Department has allowed Blue Cypress to use the existing, unpermitted, connection since 1992, while working with Blue Cypress to develop plans which would provide reasonable access onto State Road 15 while ensuring the traffic safety on the highway. A left turn lane at the Blue Cypress connection is necessary to ensure safe and efficient movement of traffic on State Road 15.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Section 120.57(1), Fla. Stat.

13. The Department is responsible for regulating "access and connections to the State Highway System . . . in order to protect the public health, safety, and welfare." Section 335.182, Fla. Stat. The regulations governing access and connections to the state highway system are set out in sections 335.18-.188, Florida Statutes, which are known collectively as the "State Highway System Access Management Act," and in rule chapters 14-96 and 14-97, Florida Administrative Code.

14. The legislature has expressed its intent that reasonable access to the state highway system be provided to property owners, but the legislature has also made it clear that the right of reasonable access does not include "the right of unregulated access." Section 335.181(2), Fla. Stat.

15. Section 335.1825(1), Florida Statutes, prohibits construction of a connection to the state highway system until an access permit is obtained from the Department.

16. Access permits may include reasonable conditions to ensure the safe movement of people and goods on the state highway system, Section 335.185, Fla. Stat., and the Department can restrict or deny access to the state highway system "until the permittee constructs or alters the connection in accordance with the permit requirements." Section 335.1825(1), Fla. Stat.

17. Connection permits expire automatically and "become invalid if the connection is not constructed within 1 year after the issuance of the permit, unless the department extends the date of expiration, for good cause shown, upon its own initiative or upon the request of a permittee." Section 335.185(2), Fla. Stat.

18. Finally, the Department "shall initiate action to close unpermitted connections" and "shall have the right to install barriers across or remove the

connection" if the connection is subject to closure. Section 335.1825(3), Fla. Stat. In seeking closure of an unpermitted connection, the Department must follow the procedures set out in rule 14-96.012, Florida Administrative Code.

19. The uncontradicted evidence presented by the Department establishes that the permit issued to Blue Cypress on February 24, 1994, expired on February 25, 1995, that Blue Cypress did not construct the connection as specified in the permit, and that Blue Cypress has not filed a new application for a connection permit. The existing connection is, therefore, unpermitted and subject to closure pursuant to section 335.1825(3), Fla. Stat.

20. Even though the Department has the authority to close Blue Cypress's unpermitted connection, the Department cannot deny a property owner a means of reasonable access "except on the basis of safety or operational concerns as provided in s. 335.184." 335.187(5), Fla. Stat. Among the factors identified in section 335.184(3)(a) which must be considered in reviewing permit applications are the operational speed in the area of the connection, the location of the connection, the operational characteristics of the highway in the area of the connection, and the level of service in the area of the connection.

20. The uncontradicted evidence presented by the Department establishes that, based upon an analysis of the factors set out in section 335.184(3)(a), the connection of Blue Cypress to State Road 15 is unsafe at the current level of traffic volume unless a left turn lane is constructed. The Department is, therefore, authorized to close Blue Cypress's connection to State Road 15 even if there is no alternative means of reasonable access.

RECOMMENDATION

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

RECOMMENDED that the Department of Transportation enter a Final Order directing the closure of the connection of Blue Cypress Golf & R.V. Resort to State Road 15 (U.S. Highway 441) until a left turn lane is constructed at the location, and directing Blue Cypress to submit a new Connection Application and Permit to the Department, together with the applicable fee, prior to beginning construction of the left turn lane.

DONE AND ENTERED this 1st day of November 1995, in Tallahassee, Leon County, Florida.

PATRICIA HART MALONO
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 1st day of November 1995.

ENDNOTES

- 1/ Some of the documents are in the record as exhibits of the Department.
- 2/ The Department's witnesses could not explain why the 1988 application was still under review in 1992.
- 3/ Mr. Curren has been involved in the permitting process since at least November 16, 1992, when his name appeared on the temporary Connection Application and Permit.

APPENDIX TO THE RECOMMENDED ORDER IN CASE NO. 95-1951

The following are my specific rulings on petitioner's Proposed Findings of Fact.

The proposed findings of fact stated in paragraphs 1 through 3, 5 through 15, 17 through 19, 21, 22, and 24 are adopted in substance, though not verbatim, in Findings of Fact numbered 1 through 11.

The proposed findings of fact stated in paragraphs 4, 16, 20, 23, 25, and 26 are rejected as unnecessary.

The respondent submitted a letter consisting of argument, statements offered to explain and excuse its failure to construct the access connection as approved by the Department, and statements of fact based solely on documents not in the record. Because there are no separately stated proposed findings of fact, no specific rulings are made.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.