

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

COUNCIL OF CIVIC ASSOCIATIONS,
INC.,

Petitioner,

vs.

OGC CASE NO.98-0154
DOAH CASE NO.98-0999

KORESHAN UNITY FOUNDATION,
INC., and DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.

ESTERO CONSERVANCY, INC., and
DOROTHY McNEILL,

Petitioners,

vs.

OGC CASE NO.98-0173
DOAH CASE NO. 98-1000

KORESHAN UNITY FOUNDATION,
INC., and DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.

ELLEN W. PETERSON,

Petitioner,

vs.

OGC CASE NO.98-0174
DOAH CASE NO. 98-1001

KORESHAN UNITY FOUNDATION,
INC., and DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.

ENVIRONMENTAL AND PEACE
EDUCATION CENTER,

Petitioner,

vs.

OGC CASE NO.98-0354
DOAH CASE NO. 98-1002

KORESHAN UNITY FOUNDATION,
INC., and DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.

FINAL ORDER

On August 3, 1998, an Administrative Law Judge with the Division of Administrative Hearings (hereafter "DOAH") submitted his Recommended Order to the Department of Environmental Protection (hereafter "Department"). The Recommended Order indicated that copies were served upon officers of or counsel for Petitioners, Council of Civic Associations, Inc., Estero Conservancy, Inc., Environmental and Peace Education Center, and Ellen W. Peterson (hereafter "Petitioners"), and upon counsel for Respondent, Koreshan Unity Foundation, Inc. (hereafter "Koreshan"). A copy of the Recommended Order is attached as Exhibit A. An "Order Amending Recommended Order" was entered on August 17, 1998, a copy of which is attached as Exhibit B.

On August 18, 1998, the Department filed its Exceptions to the Recommended Order and Motion for Order of Remand. No Exceptions to the Recommended Order were filed on behalf of Koreshan or on behalf of any of the other parties to these proceedings. Furthermore, no Responses were filed by any of the parties opposing the Department's Exceptions to the Recommended Order and Motion for Order of Remand. The matter is now before the Secretary of the Department for final agency action.

BACKGROUND

For several years, Koreshan¹ has owned a parcel of real property adjacent to the south bank of the Estero River ("River") and the eastern right-of-way of U. S. 41 in southern Lee County, Florida. This parcel, approximately fourteen and one-half acres in size, has about 544 feet of River frontage and currently contains an amphitheater, historical house, museum,

and parking area. In October of 1996, Koreshan acquired an additional eight and one-half acres of River-front property also adjoining the eastern right-of-way of U. S. 41. This smaller parcel of property is located on the north side of the River, directly across from the larger parcel described above. Koreshan's stated purpose in acquiring the smaller parcel of land in 1996 was to provide additional parking for persons coming to Koreshan-sponsored events held on the larger parcel across the River.

On November 26, 1996, Koreshan filed a consolidated application with the Department requesting an environmental resource permit ("permit") and a related authorization for the use of sovereign submerged lands ("authorization") lying beneath the waters of the River. Koreshan's application requested a permit and an authorization to construct a wooden footbridge over the River to connect the two parcels of property situated on opposite sides of the River for pedestrian traffic. The proposed footbridge would extend approximately 180 feet and would be supported by nine pilings having minimum diameters of eight inches. The footbridge would span about eighty-four feet of water at the proposed site, and five of the pilings would be placed on sovereign submerged lands located beneath the mean high water mark of the River.

On January 13, 1998, the Department's South District Office issued a "Consolidated Environmental Resource Permit and Sovereign Submerged Lands Authorization" stating the intent of the Department to grant Koreshan's requested permit and authorization. Petitioners then filed timely petitions challenging this intended action of the Department and requesting a formal administrative hearing. The Department referred the matter to DOAH and Administrative Law Judge Robert E. Meale ("ALJ") was assigned to preside over the administrative proceeding. A DOAH formal hearing was held before the ALJ on April 30-May 1, 1998, in Fort Myers, Florida.² On August 3, 1998, the ALJ entered the Recommended Order now on administrative review.

Among the conclusions of the ALJ in the Recommended Order is that Koreshan "failed to meet the water-quality criteria applicable to an OFVV' and "failed to provide reasonable assurance that the proposed footbridge is clearly in the public interest."³ (COL 37, 39) The ALJ recommended that the Department enter a Final Order denying Koreshan's application for an environmental resource permit and related authorization for use of sovereign submerged lands.

RULINGS ON DEPARTMENT'S EXCEPTIONS

Exception No. 1

The Department's first Exception challenges the correctness of the ALJ's assertion in the Preliminary Statement portion of the Recommended Order that "neither Respondent has filed a proposed Recommended Order." This Exception, however, was rendered moot by the entry of the Order Amending Recommended Order on August 18, 1998. The stated purpose of the Order Amending Recommended Order was to correct the erroneous assertion in the original Recommended Order that no Proposed Recommended Order was filed on behalf of the Department. The Order Amending Recommended Order states that the Department's Proposed Recommended Order was "misfiled by the [DOAH] Clerk's office." The Order Amending Recommended Order also states that the ALJ "has read the [Department's] Proposed Recommended Order and determined that the Recommended Order should be amended to reflect the filing of the Proposed Recommended Order." Accordingly, the Department's Exception No. 1 is denied on the ground of mootness.

Exception Nos. 2, 3, 4, 5, 6, 7, 8, and 9

These eight Exceptions of the Department all take exception to various findings of fact of the ALJ in the Recommended Order. Included in the ALJ's challenged findings are that the pilings supporting the footbridge would have an adverse affect on the water quality of the River due to turbidity and would "adversely affect the public health, safety, or welfare and the property of others through exacerbated flooding." (FOF 20, 21, 23, 25) These challenged findings of fact also find that the five pilings to be placed in the River "effectively divide the river into six segments of no more than 14 feet each," thereby adversely affecting navigation and diminishing the recreational value of the River for canoeists and kayakers. (FOF 27, 28, 31)

It is a settled rule of administrative law in this state that the findings of fact set forth in a DOAH recommended order may not be rejected or modified by a reviewing agency, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." Subsection 120.57(1)(j), Florida Statutes. Accord Dunham v. Highlands County School Board, 652 So. 2d 894 (Fla. 2d DCA

1995); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987).

An agency reviewing a DOAH recommended order may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of the administrative law judges as the triers of the facts. Belleau v. Dent. of Environmental Protection, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); Maynard v. Unemployment Appeals Commission, 609 So. 2d 143, 145 (Fla. 4th DCA 1992). Thus, if the record in these cases contains any competent substantial evidence supporting the findings of fact of the ALJ, I am bound by such factual findings in preparing this Final Order. Bradley, supra, at 1123.

The challenged findings of fact of the ALJ do appear to be supported by competent substantial evidence of record. This competent substantial evidence includes the expert testimony at the DOAH formal hearing of biologist, Gary Beardsley, and professional engineer, Michael Morris. Therefore, the Department's Exception Nos. 2, 3, 4, 5, 6, 7, 8, and 9 are denied.

Exception No. 10

This Exception of the Department takes issue with the ALJ's Finding of Fact 33 dealing with the mitigation proposed by Koreshan. The sufficiency of a mitigation plan proposed by a permit applicant is a policy matter involving agency expertise over which the Department has exclusive final authority. Save Anna Maria. Inc. v. Dept. of Transportation, 700 So. 2d 113, 116 (Fla. 2d DCA 1997); Collier Development Corp. v. Dept. of Environmental Regulation, 592 So. 2d 1107, 1109 (Fla. 2d DCA 1992); 1800 Atlantic Developers v. Dept. of Environmental Regulation, 552 So. 2d 946, 955 (Fla. 1st DCA 1989), rev. denied, 562 So. 2d 345 (1990). The ALJ's "Finding of Fact" 33, consisting of a bare conclusion that Koreshan's proposed mitigation "does not address the deficiencies inherent in the proposed activity," is essentially a conclusion of law not binding on the Department. Save Anna Maria, supra, at 116.

This Exception of the Department correctly notes that the ALJ has failed to perform his "fact-finding" duty of identifying the basic components of Koreshan's proposed mitigation plan in the Recommended Order. See Collier Development Corp. v. Dept. of Environmental Regulation, 592 So. 2d 1107, 1109 (Fla. 2d DCA 1991). Such factual findings are essential to an informed

determination in this Final Order of the sufficiency of the mitigation plan. Consequently, the Department's Exception No. 10 is granted. Nevertheless, the ALJ's failure to make specific factual findings pertaining to the details of Koreshan's proposed mitigation plan is deemed to be harmless error, since this Final Order denies the requested permit and authorization on other grounds.

Exception No. 11

The Department's Exception No. 11 takes exception to Conclusion of Law 37 wherein the ALJ concluded that "Koreshan has failed to meet the water-quality criteria applicable to an OFW." This challenged legal conclusion is based on the ALJ's related Finding of Fact 19 wherein he found that "[t]he record is devoid of evidence of the water-quality criteria for the Estero River at the time of its designation as an OFW or 1995, which is the year prior to the subject application." This critical factual finding of the ALJ was not challenged in the Department's Exceptions and must be accepted as correct in this administrative review of the Recommended Order.

Rule 624.242(2)(a)2, Florida Administrative Code, provides, inter alia, that a permit applicant proposing an activity within an OFW must affirmatively demonstrate that the "existing ambient water quality . . . will not be lowered as a result of the proposed activity." Rule 624.242(2)(c), Florida Administrative Code, defines the phrase "existing ambient water quality" as the "better water quality of either (1) that which could reasonably be expected to have existed for the baseline year of an Outstanding Florida Water designation or (2) that which existed during the year prior to the date of a permit application." The ALJ's unchallenged finding that Koreshan did not present any evidence as to the existing ambient water quality at the subject OFW River site compels a conclusion that the "antidegradation" rule requirements cited above have not been met in these proceedings. Therefore, the Department's Exception No. 11 must be denied.

Exception No. 12

The Department's Exception No. 1: takes exception to the ALJ's Conclusion of Law 39 concluding that "Koreshan has failed to provided reasonable assurance that the proposed footbridge is clearly in the public interest, in light of the seven statutory criteria." The above rulings uphold the ALJ's factual findings that the proposed footbridge would exacerbate flooding,

adversely affect navigation or flow of water, and diminish the recreational value of the River. Thus, the ALJ correctly concluded that Koreshan failed to establish that the footbridge project would be "clearly in the public interest" based on the criteria set forth in subsection 373.414(1)(a), Florida Statutes. The Department's Exception No. 12 is denied.

Exception No. 13

This Exception of the Department takes exception to Conclusion of Law 41 wherein the ALJ concluded that the proposed footbridge project "is not a water dependent activity." The ALJ thus ruled that Koreshan's proposed project does not come within the purview of Rule 18-21.004(1)(d), Florida Administrative Code, generally limiting authorized activities on sovereign submerged lands to "water dependent activities."

The Department contends in this Exception that the proposed construction of the footbridge is a sovereign submerged lands "activity" as defined in Rule 18-21.003(2), Florida Administrative Code, and is a "water dependent activity" as defined in Rule 18-21.003(56), Florida Administrative Code. The Department further contends that Koreshan's footbridge project requires an easement over the sovereign submerged lands lying beneath the mean high water mark of the River pursuant to Rule 18-21.005(1)(d), Florida Administrative Code. I concur with these contentions of the Department and reject the ALJ's rule interpretation that Koreshan's proposed footbridge over the River is not a "water dependent activity."

Although there are severe restrictions on rejecting findings of fact in a DOAH recommended order, a reviewing agency is free to disagree with and reject an administrative law judge's conclusions of law and interpretations of administrative rules over which the agency has substantive jurisdiction. See subsection 120.57(1)(j), Florida Statutes. Accord MacPherson v. School Board of Monroe County, 505 So. 2d 682 (Fla. 3d DCA 1987); Siess v. Dept. of Health and Rehabilitative Services, 468 So. 2d 478 (Fla. 2d DCA 1985); Alles v. Dept. of Professional Regulation, 423 So. 2d 624 (Fla. 5th DCA 1982). I have been delegated authority from the Board of Trustees of the Internal Improvement Trust Fund to "take final agency action on applications to use sovereign submerged lands" when the application involves an activity for which the Department "has permitting responsibility." See Rule 18-21.0051, Florida Administrative Code. Since Koreshan's footbridge project requires an environmental resource permit from the Department, I

have "substantive jurisdiction" in these cases over the cited rules pertaining to Koreshan's related request for an authorization to use the subject sovereign submerged lands underlying the River.

Koreshan's footbridge project calls for the placement of five support pilings on sovereign submerged lands lying beneath the River. Therefore, the construction of the footbridge and its support pilings is an activity requiring direct access to the waters of the River and to the underlying sovereign submerged lands within the purview of Rules 18-21.003(2) and 18-21.003(56), Florida Administrative Code. Moreover, Rule 18-21.005(1)(d)2, Florida Administrative Code, expressly provides that "bridge crossings" over sovereign submerged lands require an easement.

I also concur with the Department's contention that the ALJ failed to make appropriate factual findings concerning the nature and extent of Koreshan's requested easement over the subject sovereign submerged lands underlying the River. Nevertheless, for the reasons set forth in the prior rulings, this Final Order denies Koreshan's environmental resource permit request for the construction of the proposed footbridge. Consequently, Koreshan has failed to comply with the "concurrency" requirements of Florida law imposing as an additional condition to the issuance of an authorization to use sovereignty lands that all statutory and rule standards applicable to a consolidated environmental resource permit request also be met. See e.g., §§ 253.77(2) and 373.427(3), Florida Statutes; Rule 18-21.00401(2), Florida Administrative Code.

Since Koreshan has not established its entitlement to the environmental resource permit, its sovereignty lands easement request must also be denied due to noncompliance with the "concurrency" requirements. Thus, the ALJ's failure to make appropriate factual findings concerning the nature and extent of the easement and his misinterpretation of Rule 18-21.004(1)(d) do not affect the ultimate disposition of these cases or warrant a remand to DOAH. The Department's Exception No. 13 is granted to the extent that Conclusion of Law 41 of the Recommended Order is rejected, but this erroneous legal conclusion of the ALJ is deemed to be harmless error.

Exception No. 14

The Department's final "Exception" consists of a Motion for Order of Remand to DOAH for "further proceedings." The Department's Exception Nos. 10 and 13 have been granted hereinabove, subject to determinations that the ALJ's respective conclusions constitute harmless error. Furthermore, this Final Order also upholds the ALJ's conclusions that Koreshan has failed to provide reasonable assurances that its proposed footbridge will not violate water quality standards applicable to an OFW or is "clearly in the public interest." Under these circumstances, a Final Order denying both the requested permit and easement is the appropriate disposition of these cases, rather than a remand to DOAH for further proceedings. The Department's Exception No. 14 is denied.

CONCLUSION

The segment of the Estero River where Koreshan proposes to construct its footbridge has been officially designated an "Outstanding Florida Water" in Rule 62-302.700(9)(i)12, Florida Administrative Code. As an OFW, this segment of the River is "worthy of special protection" because of its natural attributes and is entitled to "the highest protection" against degradation of its waters. See Rules 62-302.200(17) and 62-302.700(1), Florida Administrative Code. Koreshan's failure to present evidence of the existing ambient water quality in this segment of the River as required by Florida law does not provide reasonable assurance that its proposed footbridge project will comply with these special water quality standards applicable to an OFW. In addition, the "concurrency" requirements of Florida law pertaining to a consolidated application for an environmental resource permit and an authorization for use of sovereignty lands also compel denial of Koreshan's related easement request.

It is therefore ORDERED:

A. The Petition of Council of Civic Associations, Inc., is dismissed.

B. The Department's Motion for Order of Remand of these consolidated cases to DOAH for further proceedings is denied.

C. The ALJ's Recommended Order, as modified hereinabove, is otherwise adopted and incorporated herein by reference.

D. Koreshan's consolidated application filed with the Department requesting an environmental resource permit and a related easement over sovereign submerged lands in connection with its proposed footbridge project at the River site in southern Lee County, Florida, is DENIED.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M. S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 15th day of September, 1998, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

(for) VIRGINIA B. WETHERELL
Secretary
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILING AND ACKNOWLEDGMENT FLED, ON THIS DATE,
PURSUANT TO §120.52 FLORIDA STATUTES,
WITH THE DESIGNATED DEPARTMENT CLERK,
RECEIPT WHICH IS HEREBY ACKNOWLEDGED.

Kathy C. Carter
Clerk

ENDNOTES

1/ Koreshan is a not-for-profit corporation dedicated to the preservation of the Koreshan heritage. Koreshan derives its heritage from a largely self-sufficient community formerly located in southern Lee County

2/ The petition of Council of Civic Association, Inc. was voluntarily dismissed at the commencement of the DOAH formal hearing.

3/ It is undisputed that the portion of the Estero River where Koreshan's proposed footbridge would be located has been officially designated as an Outstanding Florida Water ("OFW"). Thus, Florida statutory law requires Koreshan to provide reasonable assurance that the footbridge "will be clearly in the public interest." See § 373.414(1). Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

Kathy Malone
Vice President and Treasurer
Council of Civic Associations, Inc.
Post Office Box 919
Estero, FL 33919-0919

Mark E. Eblini
Humphrey & Knott, P.A.
1625 Hendry Street, Suite 301
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Reginald McNeill
Dorothy McNeill, President
Estero Conservancy, Inc.
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Cathy S. Reiman
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Naples, FL 34101 -3032

Ann Cole, Clerk and
Robert E. Meale, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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Tallahassee, FL 32399-1550

and by hand delivery to:

Francine Ffolkes, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 16th day of September, 1998.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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