

STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

LARRY M. ALBRIGHT,

Petitioner,

OGC CASE NO. 99-0089

DOAH CASE NO. 99-2212

vs.

RICHARD G. MANNER and DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,

Respondents.

---

FINAL ORDER

On April 25, 2000, an Administrative Law Judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("Department"). The Recommended Order indicates copies were served upon counsels for Petitioner, Larry Albright ("Petitioner"), Respondent, Richard G. Manner ("Applicant"), and the Department. A copy of the Recommended Order is attached as Exhibit A. Exceptions to the Recommended Order were filed on behalf of the Applicant, and Responses to the Applicant's Exceptions were filed on behalf of Petitioner and the Department. The matter is now before the Secretary of the Department for final agency action.

BACKGROUND

The Applicant owns an existing single-family stilt house located on the Gulf of Mexico at Fort Myers Beach, Lee County, Florida (the "beach house"). The beach house is situated seaward of the Lee County Coastal Construction Control Line ("CCCL").<sup>1</sup> At some point prior to May 18, 1998, the Applicant had some construction work done to the beach house and appurtenant structures without applying for a permit from the Department. The unpermitted construction work consisted of building two new bedrooms and two new bathrooms at ground level underneath the existing stilt beach house, adding latticework, and extending the existing wooden deck.

The Department subsequently discovered these additions to the Applicant's beach house and notified the Applicant that the unauthorized construction constituted a major violation of § 161.053, F.S. Consequently, in June of 1998, the Applicant filed

an "after-the-fact" CCCL permit application seeking Department approval of the construction of the new bedrooms and bathrooms, latticework, and extended wooden deck. On December 10, 1998, the Department's Bureau of Beaches and Coastal Systems entered an order approving the Applicant's after-the-fact CCCL permit application for the additions to his beach house (the "Preliminary Order").

Petitioner owns a house at Fort Myers Beach adjacent to the Applicant's beach house. Petitioner objected to the Department's Preliminary Order approving the Applicant's after-the-fact permit application for his beach house additions and filed a petition for administrative hearing. The Department then forwarded the matter to DOAH and Administrative Law Judge Lawrence P. Stevenson ("ALJ") was assigned to the case. The ALJ conducted a formal administrative hearing in this case on November 16, 1999. The Recommended Order was entered by the ALJ on April 25, 2000.

#### RECOMMENDED ORDER

The Recommended Order ("RO") on review contains factual findings and legal conclusions by the ALJ that the Applicant's after-the-fact permit application failed to comply with various Department rule requirements relating to approval of CCCL permits as set forth in Chapter 62B-33, F.A.C. The ALJ also found that the Applicant neither submitted to the Department nor introduced into evidence at the DOAH hearing the asbuilt plans for the "understructure additions" as directed in the Department's Preliminary Order executed in 1998. The ALJ further found that the Applicant failed to introduce into evidence at the DOAH hearing the subject permit application and the supporting documentation relied upon by the Department in its review and preliminary approval of the Applicant's after-the-fact permit request.

The ALJ concluded in paragraph 52 of the RO that the Applicant "has ignored the permitting requirements in building the additions to his house, has submitted a permit application that appeared designed to mislead DEP as to the nature of the additions, and has disregarded the special conditions of the permit." The ALJ ultimately recommended that the Department enter a final order denying The Applicant's after-the-fact permit application. The ALJ's recommendation that the Applicant's CCCL permit application should be denied is adopted in this final order. Provided, however, the Applicant shall have 30 days to resubmit a CCCL permit application meeting all the requirements of Chapter 62B-33, F.A.C.

RULINGS ON THE APPLICANT'S EXCEPTIONS

Exception No. 1

This Exception objects to the ALJ's findings dealing with the Applicant's failure to submit copies of the as-built plans for the "understructure additions" as required in Special Permit Condition No. 1 of the Department's Preliminary Order. (RO, paragraphs 36-43) The Applicant does not challenge the ALJ's basic finding that he failed to submit to the Department or to introduce into evidence at the DOAH hearing "as-built" plans of the beach house additions certified by a professional engineer. Instead, the Applicant contends that submission of the as-built plans relates to "post permit" requirements that "are not relevant to this proceeding." This contention, which is seemingly based on the Applicant's misunderstanding of the nature of a formal administrative proceeding, is rejected.

A formal administrative hearing is a de novo proceeding intended to formulate final agency action, and is not intended "to review [agency] action taken earlier and preliminarily." See, e.g., Young v. Dept. of Community Affairs, 625 So. 2d 831, 833 (Fla. 1993); Hamilton County Commissioners v. State Dept. of Environmental Regulation, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); McDonald v. Dept. of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977). Once this permitting matter was referred to DOAH for a de nova hearing, the Department's order approving the Applicant's CCCL permit request thus became preliminary agency action subject to adoption or rejection in this Final Order. Consequently, due to Petitioner's administrative challenge, this permitting matter did not reach the "post permit" phase after entry of the Preliminary Order in 1998 as suggested in the Applicant's Exceptions.

At a de novo administrative hearing challenging the proposed issuance or denial of a permit, the evidentiary focus is not on whether the Department properly reviewed the permit application. Instead, the proof presented by the applicant at the de novo hearing must provide reasonable assurance at that time of the proposed project's compliance with applicable permitting standards. See, e.g., Haile Community Association v. Florida Rock Industries, Inc., 19 FALR 1743, 1751 (Fla. DEP 1996); Clarke v. Melton, 12 FALR 4946, 4949 (Fla. DER 1990). I agree with the ALJ's conclusion that the Applicant's failure to introduce into evidence as-built plans of the beach house "understructure additions" certified by a licensed professional engineer constitutes a major evidentiary omission in this de novo proceeding. The engineer certification is required by Rules 62B-33.007(3)(b), 62B-33.007(3)(n), and 62B-33.008(1)(j), F.A.C. In de nova administrative proceedings challenging Department

approvals of "after-the-fact" construction permits, the issue to be resolved is not whether the projects as proposed in the initial applications will comply with applicable permitting standards. Rather, the primary issue in after-the-fact permitting proceedings is whether the as-built structures existing at the time of the formal hearings comply with applicable permitting standards. See e.g., Vonel v. Wentworth, 22 FALR 1140, 1149 (Fla. DEP 1999); Bevan v. Cowart, 17 FALR 319, 327 (Fla. DEP 1994). In the Bevan case, a predecessor Secretary of this Department entered a Final Order concluding as follows:

Clearly, the best evidence of whether the seawall was within the requirements of the exemption was evidence of the actual construction thereof, rather than proposals for construction that were arguably superceded by the actual construction (emphasis supplied).

Id. at 327.

I concur with the legal conclusion in the Bevan Final Order. I also conclude that a review of duly certified "as-built plans" and supporting documents is necessary in order for a proper determination to be made by the Department that the Applicant's existing beach house additions comply with CCCL permitting standards. The as-built plans and supporting documents should demonstrate that the Applicant's beach house additions comply with the applicable provisions of Rules 62B-33.007 and 62B-33.008, F.A.C. Accordingly, the Applicant's Exception No. 1 is denied.

#### Exception Nos. 2 and 3

Eric Olu Sawyerr, a Department civil engineer who reviewed the Applicant's after-the-fact CCCL permit application, was the only witness who testified at the DOAH formal hearing. Mr. Sawyerr gave uncontradicted testimony at the DOAH formal hearing of the Applicant's failure to provide various information required by Rules 62B-33.007(3)(b), (c) & (f), and 62B-33.008(1)(f), (g), (h) & (j), F.A.C. Nevertheless, Mr. Sawyerr still was of the opinion that the Department's Preliminary Order approving the Applicant's after-the-fact CCCL permit request was correct and should be upheld.

These two Exceptions object to the ALJ's conclusion that Mr. Sawyerr's testimony was insufficient, of itself, to support a determination that the Applicant's beach house additions complied with the CCCL permitting requirements set forth in Chapter 62B-33, F.A.C. These Exceptions also object to the ALJ's related

findings and conclusions that the Applicant did not establish a prima facie case demonstrating his entitlement to the requested CCCL permit. I agree with the challenged findings and conclusions of the ALJ.

The Applicant correctly points out that an agency's interpretations of its own rules are entitled to considerable deference and should not be overturned, unless clearly erroneous. As noted in the preceding ruling, however, a contested Department permitting action that has been referred to DOAH for a formal hearing is not merely a review of the propriety of the preliminary agency action, but is a de novo proceeding designed to formulate final agency action. Consequently, once this permitting matter was referred to DOAH for a formal hearing, there was no presumption of correctness of the preliminary action taken by the Department approving the Applicant's after-the-fact CCCL permit application. See Dept. of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 789 (Fla. 1st DCA 1981); accord Boca Raton Artificial Kidney Center v. Dept. of Health and Rehabilitative Services, 475 So. 2d 260, 262 (Fla. 1st DCA 1985).

A reviewing agency may not reweigh the evidence presented at a DOAH formal hearing or judge the credibility of witnesses. These evidentiary matters are within the province of administrative law judges, as the finders of the facts in de novo proceedings. See Belleau v. Dept. of Environmental Protection, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); Florida Dept. of Corrections v. Bradley, 510 So. 2d 1122 (Fla. 1st DCA 1987); Heifitz v. Dept. of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Therefore, the findings in the RO concerning Mr. Sawyerr's credibility and the weight to be given to his testimony appear to be evidentiary matters within the sound discretion of the ALJ. I thus decline to substitute my judgment for that of the ALJ as to the insufficiency of Mr. Sawyerr's testimony, especially considering that Mr. Sawyerr was not accepted by the ALJ to testify as an expert in CCCL permitting requirements and standards.<sup>2</sup>

I deem it to be significant that the Applicant's Exceptions do not challenge the ALJ's findings in paragraphs 31 and 34 of the RO. In paragraph 31, the ALJ found that, when Mr. Sawyerr reviewed the Applicant's CCCL permit application, he believed it was limited to "interior remodeling of the existing living space" of the beach house. In paragraph 34, the ALJ cites to testimony of Mr. Sawyerr that the application and supporting documents submitted by the Applicant did "not provide sufficient information to form an objective judgement whether Respondent's construction meets the requirements of DEP's rules."

The Applicant further objects to the ALJ's conclusion that this Final Order should reject Mr. Sawyerr's testimony that the various deficiencies in the Applicant's CCCL permit application should be "waived". However, I adopt the ALJ's conclusion that the testimony of Mr. Sawyerr is insufficient to establish a "waiver" on the part of the Department of all the deficiencies in the Applicant's CCCL permit application. The Applicant did not object to the ALJ's finding in paragraph 21 of the RO that neither the Applicant nor the Department "submitted any documentary evidence to support DEP's decision to waive the foundation and elevation requirements of Rule 62B-33.007(3)(c) or even to demonstrate that DEP followed the substantive provisions of its own rule in granting the waiver." I would also note that the Applicant's Exceptions do not contain citations to any statutory or rule provisions authorizing the Department to waive all the deficiencies found by the ALJ to exist in the subject CCCL permit application.<sup>3</sup>

The Applicant further disagrees with the ALJ's reliance on the Florida case law requirement that a permit applicant's burden of proof at a de nova formal hearing includes, at the very minimum, presentation of "the application and the accompanying documentation and information relied upon by the agency as a basis for the issuance of its notice of intent." J.W.C. Company, 396 So. 2d at 788. The J.W.C. Company opinion is a landmark judicial decision in this state governing evidentiary procedures and standards in formal administrative hearings. I find no error in the ALJ's reliance on the J.W.C. Company rationale in this case.

Based on the above rulings, the Applicant's Exception Nos. 2 and 3 are denied.

It is therefore ORDERED:

A. The ALJ's alternative recommendation that this Final Order should establish a date certain by which the Applicant must "remove the unpermitted understructure habitable space" is rejected as constituting an enforcement matter beyond the scope of this permit proceeding.

B. As modified in paragraph A above, the RO is adopted and incorporated by reference herein.

C. The Preliminary Order of the Bureau of Beaches and Coastal Systems approving the Applicant's after-the-fact CCCL permit is not affirmed in this Final Order.

D. The Applicant's after-the-fact permit application number "LE-823 ATF CF" is DENIED. This permit denial, however,

is without prejudice to the Applicant's filing of another CCCL permit application meeting all the requirements of Chapter 62B-33, F.A.C., and containing "as-built plans for the understructure additions" to his beach house certified by a professional engineer licensed in this state.

E. If the Applicant does not file a subsequent CCCL permit application as described in paragraph D within 30 days from this date or the date of the disposition of any appellate decision affirming this Final Order, the Department's South District Office is directed to conduct an investigation to determine whether additional enforcement proceedings against the Applicant are warranted based on the rulings in this Final Order.

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 9th day of June, 2000, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

---

DAVID B. STRUHS, Secretary  
Marjory Stoneman Douglas Building  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

ENDNOTES

1/ Section 161.053, Florida Statutes, requires the Department to establish "coastal construction control lines on a county basis along the sand beaches of the state . . . so as to define that portion of the beach-dune system which is subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions." The Lee County CCCL was established by the Department and is codified in Rule 62B-26.007, F.A.C. The cited statute and rule require a permit from the

Department for any excavation or construction on property seaward of the established CCCL.

2/ The transcript of the DOAH formal hearing indicates that Mr. Sawyerr was not tendered by either the Applicant or the Department as an expert in the area of CCCL permitting requirements.

3/ Rule 62B-33.007(3)(c), F.A.C., does authorize the Department to "grant a waiver of the elevation or foundation requirements for additions, repairs, or modifications to existing nonconforming habitable structures, provided that the addition, repair, or modification does not advance the seaward limits of construction at the site and does not constitute rebuilding of the existing structure." However, neither the Applicant nor the Department have cited to any other provisions authorizing the Department to waive the CCCL permit requirements set forth in Rules 62B-33.007(3)(b) & (f), and 62B-33 008(1)(f), (g), (h) & (j), F.A.C.

CERTIFICATE OF SERVICE

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

Steven C. Hartsell, Esquire  
Pavese, Haverfield, Dalton,  
Harrison & Jensen, L.L.P.  
1833 Hendry Street  
Post Office Drawer 1507  
Fort Myers, FL 33902

Ann Cole, Clerk and  
Lawrence P. Stevenson, Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, FL 32399-1550

and by hand delivery to:

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

Michael J. Ciccarone, Esquire  
Annis, Mitchell, Cockey,  
Edwards & Roehn, P.A.  
Post Office Box 60259  
Fort Myers, FL 33906-6259

this 12th day of June, 2000.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

---

J. TERRELL WILLIAMS  
Assistant General Counsel  
3900 Commonwealth Blvd., M.S. 35  
Tallahassee, FL 32399-3000  
Telephone 850/488-9314