

7-30-01

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FILED
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DIVISION OF
ADMINISTRATIVE
HEARINGS

RUSTIC HILLS PHASE III PROPERTY OWNERS ASSOCIATION,)
)
)
Petitioner,)
)
)
vs.)
)
RICHARD OLSON; MILDRED OLSON;)
and DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
)
Respondents.)
/

AT

OGC CASE NO. 00-2175
DOAH CASE NO. 00-4792

JLW-closed

FINAL ORDER

An administrative law judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("DEP") in this administrative proceeding. A copy of the Recommended Order is attached hereto as Exhibit A. The Recommended Order indicates that copies were served upon the President of Rustic Hills Phase III Property Owners Association ("Petitioner"), and the counsel for Richard and Mildred Olson (the "Olsons"). Exceptions to the Recommended Order were filed on behalf of the Olsons. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

The Olsons own six lots in Rustic Hills Phase III located in Martin County, Florida. Bessey Creek, a navigable stream, winds through Rustic Hills and the Olsons' lots and connects with the St. Lucie River by means of a man-made canal. The Olsons propose to widen one existing bridge and construct two additional bridges for pedestrian

The ALJ entered a Recommended Order in this case on July 30, 2001. The ALJ found and concluded in his Recommended Order that Olsons' Project will not significantly impede navigation in Bessey Creek and will not have a significant adverse impact on off-site flooding. The ALJ also found that Petitioner's participation in this administrative proceeding was not for an "improper purpose" under § 120.595(1), Florida Statutes. The ALJ ultimately recommended that DEP enter a Final Order authorizing the Olsons to use the Notice General Permit established in Rule 62-341.475, but denying the Olsons' request for attorney's fees from the Petitioner.

RULINGS ON OLSONS' EXCEPTIONS TO RECOMMENDED ORDER

The Exceptions filed on behalf of the Olsons do not contest any of the ALJ's factual findings, legal conclusions, or recommendations pertaining to the use of the noticed general permit provisions of Rule 62-341.475. Instead, the Olsons object to numbered paragraphs 14, 15, 19, 21, 22, 25-27 of the Recommended Order. In these paragraphs, the ALJ found that the Petitioner did not participate in this proceeding for an "improper purpose." The ALJ thus recommended that DEP enter a Final Order denying the Olsons' request for an award of attorney's fees from the Petitioner based on the provisions of § 120.595(1), Florida Statutes.

The question of whether a party intended to participate in a formal administrative proceeding for an improper purpose has been judicially determined to be an issue of fact within the prerogative of the administrative law judge, rather than a conclusion of law that may be freely rejected by the reviewing agency. Burke v. Harbor Estates Associates, Inc., 591 So.2d 1034, 1037 (Fla. 1st DCA 1991). Accord, Bevan v. Cowart, 17 FALR 319, 326 (Fla. DEP 1994). Furthermore, the court noted in the Burke decision

entire record, I am unable to determine that there is no competent substantial evidence in this case to support a permissible inference by the ALJ that the Petitioner did not participate in this proceeding for an improper purpose. I thus decline to substitute my judgment for that of the ALJ on this factual matter by reweighing the evidence or by drawing inferences therefrom that are different from those of the ALJ. Id. at 1281.

CONCLUSION

The Olson's Exceptions contains a prayer for relief that DOAH reconsider their Motion for Attorney's Fees and, if necessary, hold an additional evidentiary hearing. For the reasons stated above, I am of the view that a remand to DOAH for further proceedings would not be appropriate in this case. The Recommended Order on review contains the ALJ's ultimate finding that the Petitioner did not "participate in this proceeding for an improper purpose" within the purview of § 120.595(1), Florida Statutes. I find no reversible error on the part of the ALJ in arriving at this ultimate finding. Accordingly, the Olsons' Exceptions objecting to the ALJ's Findings of Fact Nos. 14, 15, 19, 21, 22, 25-27 are denied.

It is therefore ORDERED that :

A. The DOAH Recommended Order (Exhibit A) is adopted in its entirety and incorporated by reference herein.

B. The Olsons' Motion for Attorney's Fees under § 120.595(1), Florida Statutes, is denied.

C. The Olsons' Project is qualified for the noticed general permit granted by Rule 62-341.475, subject to the requirements of this rule and the general conditions for all noticed general permits set forth in Rule 62-341.215, Florida Administrative Code.

CERTIFICATE OF SERVICE

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

Tim Morell, Esquire
1933 Tom-a-Toe Road
Lantana, FL 33426

Elizabeth P. Bonan, Esquire
Cornett, Googe, Ross & Earl, P.A.
401 East Osceola Street
Stuart, FL 32991

Dan White, President
Rustic Phase III Property Owners Assoc.
3337 Southwest Bessey Creek Trail
Palm City, FL 34990

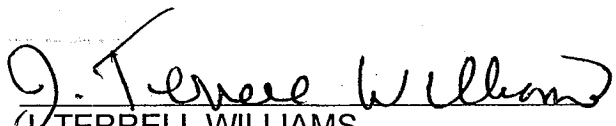
Ann Cole, Clerk and
J. Lawrence Johnston, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

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

this 7th day of September, 2001.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


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