8-14-01

FILED
01 OCT -1 PM 2:24
DIVISION OF ADMINISTRATIVE HEARINGS

AT

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN LAY AND JANET LAY,

Petitioners,

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

OGC CASE NOs. 01-0203
01-0204
DOAH CASE NOs. 01-1541
01-1542

JLJ-CWS

FINAL ORDER

On August 14, 2001, an Administrative Law Judge with the Division of Administrative Hearings (hereafter "DOAH") submitted his Recommended Order to the Department of Environmental Protection (hereafter "Department"). A copy of the Recommended Order was also furnished to *pro se* Petitioners, John and Janet Lay (hereafter the "Lays").[1] A copy of the Recommended Order is attached hereto as Exhibit A. Exceptions to the Recommended Order were timely filed on behalf of the Department. The Recommended Order and the Exceptions are now before the Secretary of the Department for final agency action.

BACKGROUND

The Lays are the owners of Lots 16 and 17, Cayo Costa Subdivision, located on Cayo Costa Island in Lee County, Florida. On July 12, 2000, the Lays filed a

[1] The Recommended Order lists the Department as the "Petitioner" and John and Janet Lay as the "Respondents." Nevertheless, it is undisputed that it was the Lays who filed a petition with the Department contesting the agency action revoking two prior consents of use authorizing the Lays to use sovereign submerged lands to build their single-family dock. Thus, the Lays are the Petitioners, rather than the Respondents, in this administrative proceeding.

consolidated application for exemption from the need to obtain an environmental resource permit and for a consent of use for a 208 square foot single-family dock. A portion of the proposed dock project would be built on sovereign submerged lands owned by the State of Florida underlying a lagoon west of Pelican Bay. Due to the Department's focus on minimizing adverse impacts on mangroves bordering the lagoon, the Lays eventually agreed to submit additional information and to reduce the size of their proposed dock to 58 square feet. The revised application was granted by the Department on August 21, 2000, in DEP File No. 36-0172390-001.

The consent of use included General Consent Conditions. Among other things, they stated: "The Letter of Consent associated with these General Consent Conditions as well as these conditions themselves are subject to modification after five (5) years in order to reflect any applicable changes in statutes, rule or policies of the Board [of Trustees of the Internal Improvement Trust Fund] or its designated agent [DEP]."[2] There were no other conditions or statements regarding modification or revocation of the consent of use.

After obtaining their exemption and consent of use in DEP File No. 36-0172390-001, the Lays determined that they needed a larger dock. On September 11, 2000, the Lays applied for another exemption and consent of use for a 114 square foot single-family dock. This application was granted by the Department on October 14, 2000 in DEP File No. 36-0172390-002. This consent of use contained the same General Consent Conditions as the first consent of use for the proposed 58 square foot dock.

---

[2] The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida ("Trustees"), which holds the title to state lands, has delegated to the Department the authority to grant proprietary authorizations to use sovereign submerged lands for private single-family docks like the one proposed to be built by the Lays.

Like the original consent of use issued to the Lays, no provisions were set forth in the consent of use issued in DEP File No. 36-0172390-002 regarding modification or revocation.

In January of 2001, the County Attorney for Lee County sent the Department a copy of a boundary survey of Lots 16 and 17 prepared by Ted B. Urban, a professional land surveyor. See the Lays' "Exhibit A" admitted into evidence at the DOAH final hearing. This boundary survey reflects that the Lays' proposed dock facility would have to traverse a strip of land above mean high water ("MHW") approximately 10-15 feet in width. This strip of land east of the boundaries of Lots 16 and 17 and above the MHW is designated as a "road easement" on the boundary survey.

Based primarily on its review of this boundary survey, the Department concluded that the Lays were not "upland riparian" landowners within the purview of Rule 18-21.004(3)(b), Florida Administrative Code ("F.A.C."). Accordingly, the Department issued a letter dated January 18, 2001, notifying the Lays that the prior consents of use of sovereign submerged lands issued in DEP File Nos. 36-0172390-001 and 36-0172390-002 "are hereby revoked." See "DEP Ex. 15" admitted into evidence at the DOAH final hearing. The Lays then filed a petition contesting the Department's agency action proposing to revoke the two prior consents of use.

DOAH PROCEEDING

The Department forwarded the Lays' petition to DOAH and requested a formal administrative proceeding. Administrative Law Judge, J. Lawrence Johnston ("ALJ"), was assigned to preside over the case. The ALJ held a formal administrative hearing in this case on June 29, 2001. In his subsequent Recommended Order, the ALJ

concluded that the Department did not have legal authority to revoke the two consents of use previously issued to the Lays. This legal conclusion of the ALJ was based on several grounds, including the applicability to this case of the doctrine of "administrative finality." The ALJ ultimately recommended that the Department enter a final order disapproving the notice dated January 18, 2001, attempting to revoke the two consents of use issued to the Lays in DEP File Nos. 36-0172390-001 and 36-0172390-002.

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

Exception No. 1

The Department's first Exception objects to the ALJ's Conclusions of Law 16, 17, and 18. These challenged legal conclusions of the ALJ all pertain to the issue of whether the doctrine of "administrative finality" applies in this case. The rationale underlying the administrative finality doctrine is that there must be a "terminal point at which the parties and the public may rely on a decision of an agency as being final and dispositive of the rights and issues therein." Reedy Creek Utilities Co. v. Florida Public Service Commission, 418 So.2d 249, 253 (Fla. 1982); Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966). The ALJ concluded that the administrative finality doctrine did apply in this case, thereby precluding the Department from revoking the two prior consents of use granted to the Lays in the year 2000.

The sole legal authority cited and discussed by the ALJ as precedent for his conclusion that the administrative finality doctrine precluded the Department from revoking the two prior consents of use granted to the Lays is a prior final order of this agency entered in the case of Dept. of Environmental Protection v. Brotherton and Sportman's Lodge Development Corp., ER FALR 97:172 (Fla. DEP 1997). The

Brotherton Final Order relied on the administrative finality doctrine as the basis for disapproving an attempted revocation by the Department in 1996 of a permit exemption determination and a consent of use granted to Brotherton in 1993 in connection with a proposed dock repair project in Citrus County.

The Department contends that the 1997 Brotherton Final Order relied upon by the ALJ is distinguishable on its facts and is not controlling as to the disposition of the instant case. This contention of the Department's is based on a portion of the Brotherton Final Order stating that:

> the record in this case does not demonstrate that the Department's attempted revocation of DER's Letter of Exemption No. 092309393 is based on critical newly-discovered evidence not included in Brotherton's 1993 exemption application package." (emphasis supplied)

The Department asserts that, unlike Brotherton, there is "critical newly-discovered evidence" in this case supporting the propriety of the revocation action of this agency. The critical newly-discovered evidence relied upon by the Department is the boundary survey it received from the County Attorney for Lee County in January of 2001. See the Lays' "Exhibit A."

The Department's contention that the boundary survey constitutes "critical newly-discovered evidence" is based on the fact that this survey shows a 60-foot wide "road easement" adjacent to the eastern boundaries of Lots 16 and 17. The boundary survey further reflects that, at the point where the Lays propose to build their dock, about 10-15 feet of the road easement is located above the MHW point. The Department argues that the existence of this 10-15 foot wide road easement between the eastern boundaries of Lots 16 and 17 and the MWH at the proposed dock site precludes the Lays from being "upland riparian" landowners under Rule 18-21.004(3)(b), F. A. C.

The Department's contention that the road easement constitutes a separate parcel of property between Lots 16 and 17 and the MWH was rejected by the ALJ. Instead, the ALJ concluded that, due to the absence of any proof in this case to the contrary, the Lays own to the centerline of the 60-foot road easement shown on the boundary survey as a matter of established real property law. See, e.g., Smith v. Horn, 70 Fla. 484, 70 So. 435, 436 (Fla. 1915); Joseph v. Duran, 436 So.2d 316, 317 (Fla. 1st DCA 1983); Feig v. Graves, 100 So.2d 192, 196 (Fla. 2d DCA 1958). I agree with the ALJ's application of this settled rule of real property law to the facts of this case.

In his Recommended Order, the ALJ asserted that there was no evidence presented at the DOAH final hearing that the road easement in question was ever officially dedicated to the public and/or that dedication of the road easement was ever officially accepted by Lee County. The ALJ also asserted that no evidence was presented at the final hearing that the developer of the Cayo Costa Subdivision retained any reversionary interest in the road easement. Neither of these assertions of the ALJ was challenged by the Department in its Exceptions.

I further agree with the ALJ's related finding that the Lays' ownership to the centerline of the 60-foot wide road easement would place the MHW adjacent to property owned by the Lays at the point where the proposed dock is to be built. Therefore, contrary to the Department's claim, the boundary survey does not establish that there is a separate upland parcel of land not owned by the Lays between the eastern boundaries of Lots 16 and 17 and the MHW at the dock site.

Consequently, even when the boundary survey relied upon by the Department is taken into consideration, it still fails to establish that the Lays are not "upland riparian"

landowners under Rule 18-21.004(3)(b), F.A.C. I thus reject the Department's suggestion that the matters reflected in the boundary survey constitute "critical newly-discovered evidence" rendering the doctrine of administrative finality inapplicable to the final action of this agency granting the two consents of use to the Lays in the year 2000.

I acknowledge that there is Florida case law concluding that, notwithstanding the administrative finality doctrine, a state agency may revoke or modify a prior final action under "extraordinary circumstances." See, e.g., Russell v. Dept. of Business & Professional Regulation, 645 So.2d 117, 119 (Fla. 1st DCA 1994); Richter v. Florida Power Corp., 366 So.2d 798, 800 (Fla. 2d DCA 1994). However, for the reasons stated above, I do not view the boundary survey received by the Department in January of 2001 to be the source of such "extraordinary circumstances" as to warrant the revocation of the two consents of use granted to the Lays in the year 2000.

I also recognize that, notwithstanding the administrative finality doctrine, a state agency may be expressly authorized by statute or rule to revoke or modify a prior final action under certain conditions. For instance, the Department is expressly authorized to suspend and/or revoke regulatory "permits" under stated conditions pursuant to Rules 62-4.100 and 62-343.140, F.A.C. However, the courts have ruled that the term "permit," within the context of environmental regulation provisions, does not include a lease, license, easement, or other form of consent to use sovereign submerged lands granted pursuant to Chapter 253, Florida Statutes, and Chapter 18-21, F.A.C. Graham v. Edwards, 472 So.2d 803, 807 (Fla. 3d DCA 1985).

Accordingly, the Department's Exception No. 1 is denied.

Exception No. 2

In its second Exception, the Department objects to the ALJ's Conclusions of Law 13, 14, 15, and 21. The challenged legal conclusions of the ALJ deal with the apparent lack of any express statutory or rule authority for the Department to revoke a prior final agency action granting a consent of use of sovereign submerged lands on behalf of the Trustees. In my preceding ruling, I determined that the Department's attempted revocation of the two consents of use granted to the Lays in the year 2000 is precluded by the doctrine of administrative finality. The Department's second Exception is also denied for the same reason. I would also note that the Department's second Exception fails to cite to any statute or administrative rule expressly authorizing the Department to revoke, on behalf of the Trustees, a prior final agency action granting a consent of use of sovereign submerged lands.

I agree that when the Department is exercising its delegated authority from the Trustees, it is acting in a proprietary capacity that is different from this agency's regulatory capacity. Accord Graham, 472 So.2d at 807. I am also aware that there is case law suggesting that a prior consent of use of sovereign submerged lands may be subject to revocation under some conditions, provided that there is compliance with the provisions of the Florida Administrative Procedure Act ("APA"). See Trustees v. Barnett, 533 So.2d 1202, 1206 (Fla. 3d DCA 1988). In any event, I conclude that the boundary survey relied upon by the Department does not reflect the existence of conditions that are sufficient to warrant revocation of the two consents of use previously granted to the Lays, even though the requirements of the APA were met in this case.

The Department's Exception No. 2 is thus denied.

Exception No. 3

The Department's third Exception objects to the ALJ's Conclusions of Law 19 and 20. The Department contends that these legal conclusions of the ALJ should be rejected because both the ALJ and the Department lack jurisdiction to resolve the real property issues raised by the boundary survey and the road easement. However, I do not find this contention of the Department to be persuasive.

In the course of reviewing applications for authorizations to use sovereign submerged lands, the Department is required by law to make an initial determination that the applicant is an "upland riparian owner" or has "sufficient title interest in uplands for the intended purpose." See Rule 18-21.004(3), F.A.C. The only reason given by the Department for initially considering the subject boundary survey was to determine whether it contained data indicating whether or not the Lays were upland riparian landowners as required by Rule 18-21.004(3).

If the Department does lack jurisdiction to determine whether an applicant is an "upland riparian owner" within the purview of Rule 18-21.004(3), then the provisions of this Trustees rule would be rendered essentially meaningless. In every proceeding where an applicant's position as an upland riparian owner is disputed by the Department, the matter would presumably then have to be submitted to a circuit court for resolution. The judiciary, and not the Department, would thus become the reviewer of these disputed applications for authorizations to use sovereign submerged lands.

In addition, the Department's claim that this agency lacks jurisdiction to resolve the real property issues incidental to the determination of whether the Lays are upland riparian owners appears to be directly inconsistent with the prior actions of this agency.

The very agency action contested in this proceeding involves a preliminary determination by the Department that the Lays are not upland riparian owners and are thus not entitled to a consent of use of sovereign submerged lands.

It is undisputed that the boundary survey was cited by the Department as the primary basis for its determination that revocation of the consents of use was warranted. See DEP's Ex. 15. If the Department now lacks jurisdiction to consider the upland riparian ownership issues presented in the subject boundary survey, then it would have also lacked jurisdiction to consider and rely on the boundary survey as the primary basis for revoking the consents of use granted to the Lays.

With respect to the suggestion that DOAH also lacks jurisdiction to resolve the real property issues raised in the subject boundary survey, it was the Department that gave the Lays written notice that they could contest the agency action revoking the consents of use by filing a petition for an administrative hearing. See DEP's Ex. 15. It was also the Department, not the Lays, that referred this matter to DOAH for a formal administrative hearing. I would further note that it was the Department, not the Lays, that relied heavily on the boundary survey to support its legal position in the course of the DOAH proceedings.

The Department's Exception cites to statutory and case law supporting the general proposition that the circuit courts of this state have exclusive original jurisdiction in "all cases involving the title and boundaries to real property." However, the Department's reliance on this statutory and case law is misplaced. This is not an action involving a dispute between the Lays and a third party as to the boundaries of or title to the road easement shown on the boundary survey.

This is also not an action where the Department is seeking a determination that the Trustees have title to all or a portion of the road easement. The Department's own witness, Mark Miller, testified at the DOAH final hearing that a determination was made by the Department's title and land section that "the State did not actually own that real property, but they could not determine who did own that property." (Final Hearing Tr., page 24)

In view of the above, the Department's Exception No. 3 is denied.

Exception No. 4

The Department's fourth and final Exception does not object to any existing language set forth in the ALJ's Recommended Order. Instead, the Department contends that the ALJ "appears to apply a 'clear and convincing evidence' standard in Conclusions of Law 15, 18, 19, 20, and 21." Nevertheless, there is no reference by the ALJ in the Recommended Order to the phrase "clear and convincing evidence." To the contrary, as noted in the Department's Exception, the ALJ asserts in his Conclusion of Law 12 that the Department "has the burden to prove legal grounds for revocation by [a] preponderance of the evidence."

Assuming that the burden of proof is on the Department in a proceeding where a party is challenging an agency action revoking a prior proprietary authorization, then I agree that the appropriate standard of proof to be imposed on the Department is the "preponderance of the evidence" standard. Moreover, I do not construe the provisions of Conclusions of Law 15, 18, 19, 20, and 21 to embody a tacit endorsement by the ALJ of a "clear and convincing evidence" standard of proof in this administrative proceeding.

The Department's Exception No. 4 is denied.

It is therefore ORDERED:

A. The Recommended Order of the ALJ, with the modified case style, is adopted and incorporated by reference herein.

B. The Department's preliminary action issuing the revocation letter to the Lays on January 18, 2001, is hereby DISAPPROVED.

C. This administrative proceeding seeking the revocation of two consents of use granted in DEP File Nos. 36-0172390-001 and 36-0172390-002 is DISMISSED.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, F.S., 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 with 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 Department clerk.

DONE AND ORDERED this 27 day of September, 2001, 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

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

CLERK DATE 9/28/01

CERTIFICATE OF SERVICE

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

John and Janet Lay
3901 Southwest 27th Court
Cape Coral, FL 33914

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 28th day of September, 2001.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

J. Terrell Williams

J. TERRELL WILLIAMS
Assistant General Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/488-9314