

Delongs located at 707 Presidential Drive in the City of Boynton Beach. In one of their applications, the Delongs sought approval from DEP to construct a vinyl seawall (“DEP File No. 1”). The other two applications requested approval from DEP to build a private single-family dock at the site. The Delongs’ initial dock application filed in 1999 will be referred to herein as “DEP File No. 2.” In 2001, DEP opened an additional agency file (“DEP File No. 3”) in response to the filing by the Delongs of a new dock application.

DEP ultimately determined that it had no jurisdiction over the Delongs’ proposed seawall project because it was to be constructed entirely on upland property. With respect to the two dock applications, DEP determined that the proposed dock structures were exempt from the need for an environmental resource permit under Rule 40E – 4.051(3)(b), Florida Administrative Code.¹ Pursuant to the concurrency provisions of § 253.77, Florida Statutes, DEP also granted related proprietary authorizations to the Delongs to use sovereign submerged lands underlying Lake Worth in connection with the two dock applications

Singer, a nearby residential property owner, objected to all three of the Delongs’ applications in a series of letters written to DEP in May through August of 2001. DEP then forwarded the matter to DOAH and Administrative Law Judge Charles Stampelos, was assigned to conduct a formal hearing. A formal hearing was commenced, but Singer moved to disqualify Judge Stampelos on the second day of the hearing. Singer’s motion to disqualify was granted, and the case was subsequently transferred to Administrative Law Judge John G. Van Laningham (“ALJ”).

¹ Rule 40E-4.051(3)(b), F.A.C., exempts from environmental permitting requirements private docks not exceeding 1,000 square feet in size, provided that the additional rule criteria are met. The private docks described in the two applications filed by the Delongs do not exceed 1,000 square feet in size.

The record reflects that, by letter from their counsel dated May 16, 2002, the Delongs withdrew their second dock application described in DEP File No. 3 (the "Redesigned Dock"). Nevertheless, the ALJ expressly found in his Recommended Order that, at some point in time, the Delongs proceeded with construction of a dock facility that was completed "according to the blueprint of the Redesigned Dock."

On May 17, 2002, DEP filed a Motion to Dismiss Singer's challenges and a related Motion to Relinquish Jurisdiction as to all three applications filed by the Delongs. In ruling on these motions, the ALJ concluded that there existed no genuine disputes of material fact with regard to DEP File Nos. 1 and File 3. However, the ALJ ruled that certain aspects of Singer's dock challenge related to DEP File No. 2 could proceed. Accordingly, jurisdiction over the dock application described in DEP File No. 3 was relinquished to DEP.

The ALJ also dismissed Singer's challenge to the Delongs' seawall project described in DEP File No. 1, with leave to amend. Nevertheless, Singer did not amend his petition challenging this seawall project. On the day before a DOAH final hearing on the merits of Singer's remaining claims was scheduled to reconvene before the ALJ, Singer filed a Request to Withdraw Petition for Administrative Hearing. Singer's Request to Withdraw Petition for Administrative Hearing was granted by the ALJ.

Shortly after Singer's Petition for Administrative Hearing was withdrawn, the Delongs filed their Motion for Attorney's Fees and Costs pursuant to § 120.595(1), Florida Statutes. The ALJ then held an evidentiary hearing on the Delongs' motion. The Delongs called several witnesses to testify at this evidentiary hearing and also introduced into evidence the transcripts of testimony and various exhibits that were

previously admitted into evidence at the incompleated DOAH final hearing before Administrative Law Judge Stampelos. The ALJ observed that Singer failed to present any evidence at this evidentiary hearing on the issue of attorney's fees and costs.

RECOMMENDED ORDER

The sole issue considered by the ALJ in the Recommended Order on review is the Delongs' Motion for Attorney's Fees and Costs ("Motion") to be assessed against Singer. The Delongs contend that they are entitled to an award of attorney's fees and costs from Singer under § 120.595(1), Florida Statutes, because Singer is a "nonprevailing adverse party" who participated in this administrative proceeding for an "improper purpose."

The ALJ concluded in his Recommended Order that the Delongs are not entitled to attorney's fees and costs under § 120.595(1) because Singer is not a "nonprevailing adverse party" in this proceeding within the purview of the cited statutory provision. This ruling that Singer is not a nonprevailing adverse party under § 120.595(1) was based on the ALJ's observation that this proceeding "resulted in a substantial modification" of the Delongs' position by virtue of their "nullification" of the Redesigned Dock application described in DEP File No. 3. The ALJ thus recommended that a final order be entered by DEP denying the Delongs' Motion for Attorney's Fees and Costs.

RULINGS ON THE DELONGS' EXCEPTIONS TO RECOMMENDED ORDER

The sole argument raised in the Delongs' Exceptions is that the record in this case conclusively establishes that Singer presented fraudulent evidence at the hearing on the Motion for Attorney's Fees and Costs by intentionally altering a survey admitted into evidence as "Singer Ex. No. 5." The Delongs thus conclude that, as a matter of

law, this “perpetration of fraud” by Singer at the hearing on Motion for Attorney’s Fees and Costs renders him a nonprevailing adverse party who participated in this proceeding for an improper purpose under § 120.595(1), Florida Statutes.

Nevertheless, the Delongs do not cite to any statutory or case law specifically stating that the filing of fraudulent evidence in an administrative proceeding is sufficient to support a ruling that the guilty party is a nonprevailing adverse party who participated in the proceeding for an improper purpose under § 120.595(1).²

Section 120.57(1), Florida Statutes (1995), was amended in 1996 to limit the authority of a state agency to reject only those conclusions of law in a DOAH recommended order over which the agency has “substantive jurisdiction.” See current subsection 120.57(1)(l), Florida Statutes (2002). I have not been presented with any statutory or case law clearly supporting the proposition that the ALJ’s determination that Singer is not a “nonprevailing adverse party” in this proceeding is a matter within the substantive jurisdiction of this agency under subsection 120.57(1)(l). Compare Burke v. Dept. of Environmental Regulation, 591 So.2d 1034, 1037 (Fla. 1st DCA 1991) (concluding that the question of whether the appellant had participated in the administrative proceeding below for an improper purpose was essentially a factual matter over which the DOAH hearing officer had primary jurisdiction, rather than DER).

In view of the above rulings, the Delongs’ Exceptions are denied.

² I would note, however, that subsection 120.569(2)(e), Florida Statutes, does provide for awards of attorney’s fees and costs as sanctions for parties filing documents in administrative proceedings for “improper purposes.” Consequently, the Delongs may have invoked the wrong statute in support of their request for attorney’s fees and costs.

It is therefore ORDERED:

A. The Recommended Order (Exhibit A) is adopted and incorporated by reference herein.

B. The Delongs' Motion for Attorney's Fees and Costs under § 120.595(1), Florida Statutes, 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 12 day of May, 2003, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

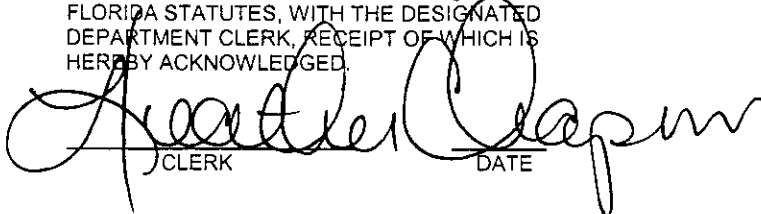


DAVID B. STRUHS

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.

 5/14/03
CLERK DATE

CERTIFICATE OF SERVICE

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

Kirk Friedland, Esquire
Flagler Drive, Suite 505
West Palm Beach, FL 33401

Michael M. Singer
695 Lakeside Harbor
Boynton Beach, FL 33435

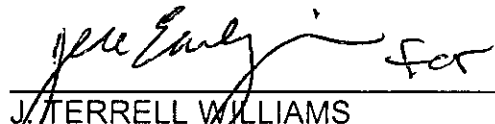
Ann Cole, Clerk and
John G. Van Laningham, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

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

this 15th day of May, 2003.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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