

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL M. SINGER,)
)
 Petitioner,)
)
 vs.) Case No. 01-3327
)
 TIMOTHY AND HOPE DELONG AND)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on October 21, 2002, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Michael M. Singer, pro se
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For Respondents: Kirk Friedland, Esquire
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For Respondent: Francine M. Ffolkes, Esquire
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STATEMENT OF THE ISSUE

This issue in this case is whether the private Respondents are entitled to recover attorneys' fees and costs from Petitioner pursuant to Section 120.595(1), Florida Statutes.

PRELIMINARY STATEMENT

Presently at issue is a Motion for Attorneys' Fees and Costs ("Motion") brought by Respondents Timothy and Hope Delong (the "Owners") pursuant to Section 120.595(1), Florida Statutes. The Owners contend that Petitioner Michael M. Singer ("Singer") participated in this proceeding for an improper purpose. Singer denies the charge.

This litigation stemmed from three applications for permits or approvals that the Owners submitted to Respondent Department of Environmental Protection (the "Department"). One of these applications sought the Department's authorization to install a vinyl seawall. The Department's file relating to the Owners' seawall project is numbered 50-0153725-001 and will be referred to herein as "File 1." The Owners' other two applications requested approvals to build a dock. The first application concerning the Owners' dock caused the Department to open its File No. 50-0153725-002 ("File 2"). The Department opened a separate file on the Owners' dock, numbered 50-0153725-003 ("File 3"), after the Owners submitted a new application relating to that particular project under circumstances that

will be described in the Findings of Fact below. In due course, the Department authorized the Owners' seawall and dock projects.

Singer, who is a neighbor of the Owners, objected to the Department's approvals. Proceeding without benefit of legal counsel, he wrote letters to the Department dated May 31, 2001; July 5, 2001; and August 30, 2001, setting forth his concerns. Throughout these proceedings, Singer's letters, collectively, have been treated as his "Petition." In his Petition, Singer purported to challenge the Department's decisions in File 1, File 2, and File 3.

In August 2001, the Department referred Singer's challenge to the Division of Administrative Hearings ("DOAH"), where it was assigned to Administrative Law Judge Stampelos and set for hearing. The final hearing commenced as scheduled on November 28, 2001, but was not completed on that day. The proceeding resumed on April 17, 2002. On the second day of the final hearing, Singer moved to disqualify Judge Stampelos. Singer's motion was granted, and as a result the case was transferred to the undersigned on or about April 18, 2002.

On May 17, 2002, the Department filed both a Motion to Dismiss and a Motion to Relinquish Jurisdiction. In ruling on these motions, the undersigned determined that there existed no genuine disputes of material fact with regard to File 1 and File 3, but that certain aspects of Singer's challenge concerning

File 2 could proceed. Accordingly, jurisdiction over File 3 was relinquished to the Department, and Singer's Petition was dismissed, with leave to amend, to the extent it attempted to challenge the preliminary agency action on the Owners' seawall. Singer elected not to amend his Petition.

On August 7, 2002—the day before the final hearing was scheduled to reconvene before the undersigned—Singer filed a Request to Withdraw Petition for Administrative Hearing. The undersigned effectively granted Singer's request by entering an Order Closing File on August 8, 2002. One week later, on August 15, 2002, the Owners filed the instant Motion directly with DOAH. The clerk's office erroneously treated the Motion as an application under Section 57.111, Florida Statutes, and docketed the matter as a new DOAH Case, numbered 02-3284F (the "Fees Case").

On August 23, 2002, the Department moved the undersigned to close DOAH's file in the Fees Case because the Owners were not seeking an award under Section 57.111. The Department also suggested that, rather than initiating a new matter, it would be more appropriate for DOAH to reopen Case No. 01-3327 (that is, the instant case) for the purpose of conducting a hearing, and entering a recommended order, on the Motion. The Owners immediately joined the Department's motion to close the Fees Case and requested that Case No. 01-3327 be reopened.

On August 26, 2002, the undersigned closed the Fees Case and entered an Order Reopening Proceedings in Case No. 01-3327. Shortly thereafter, a Notice of Hearing was issued, scheduling a final hearing on the Owners' Motion for October 21, 2002.

The final hearing on the Owners' Motion commenced according to schedule. Singer participated in part of the hearing via telephone, but he refused to stay on the line for the entire proceeding. The Owners called three witnesses: Jeffrey Berin, Esquire; Hope DeLong; and Kirk Friedland, Esquire. In addition, the Owners moved into evidence the evidence of record from the underlying case, consisting of three volumes of final hearing transcript taken on November 28, 2001; one volume of transcript taken on April 17, 2002; Owners' Exhibits numbered 1-7, 9, and 10; and Singer's Composite Exhibit 1. Finally, the Owners offered one additional composite exhibit, numbered 18, which was received in evidence. Neither the Department nor Singer presented a case.

The final hearing transcript, comprising two volumes, was filed on December 16, 2002 (Volume I) and January 16, 2003 (Volume II). The Owners and Singer each filed a proposed recommended order. The Department did not file any post-hearing papers.

FINDINGS OF FACT

Because the undersigned is not required or authorized to recommend a disposition on the merits of Singer's Petition, the fact-findings that follow are limited to those necessary to determine the narrow issue whether an award of attorneys' fees and costs is proper under Section 120.595(1), Florida Statutes. In addition, as written, the findings below assume the reader's familiarity with the preceding Preliminary Statement.

1. On July 22, 1999, the Owners submitted an application to the Department seeking approval to build a dock. In a letter dated January 21, 2000, which is included in File 2, the Department informed the Owners that it had reviewed their application "to determine whether [the proposed dock] qualifies for any of three kinds of authorization that may be necessary for works in wetlands or waters of the United States." This January 21, 2000, letter constituted the first agency action ("First Action" or "FA") concerning the Owners' dock.

2. The First Action comprised three distinct determinations (for short, "D1," "D2," and "D3"), one for each of the "three kinds of [potentially necessary] authorization[s]." These determinations were:

FA-D1: The dock is exempt from the need to obtain an Environmental Resource Permit ("ERP").

FA-D2: The dock qualifies for consent to use state sovereign submerged lands.

FA-D3: Pursuant to a "federal review" performed under an agreement between the Department and the U.S. Army Corps of Engineers, the dock is deemed consistent with the State Programmatic General Permit ("SPGP") program.

As originally designed, and as approved by the Department on January 21, 2000, the Owners' dock will be referred to herein as the "Approved Dock."

3. After receiving notice of the First Action, the Owners caused a "Notice of Determination of Exemption" to be published in the February 1, 2000, issue of the Palm Beach Daily Business Review. In pertinent part, this public notice stated:

The Department of Environmental Protection gives notice that the [Owners'] project to construct a 125-foot by 4-foot access dock and a 40-foot by 8-foot terminal platform has been determined to be exempt from the requirements to obtain an environmental resource permit. . . .

A person whose substantial interests are affected by the Department's action may petition for an administrative proceeding (hearing) under sections 120.569 and 120.57 of the Florida Statutes. . . .

* * *

Complete copies of all documents relating to this determination of exemption are available for public inspection during normal business hours . . . at the [Department's regional office].

(Owners' Exhibit No. 4).

4. Following the publication of this notice, an individual named Karrie Webb timely filed a petition with the agency challenging the Department's approval of the Approved Dock. Her

Petition for Formal Administrative Hearing was filed with DOAH on February 17, 2000, initiating Webb. v. Timothy and Hope Delong and the Florida Department of Environmental Protection, DOAH Case No. 00-0761 (the "Webb case"). The Webb case proceeded through final hearing, but before a Recommended Order was issued, the petitioner, on January 9, 2001, filed a Stipulation for Dismissal. Consequently, on January 12, 2001, the Administrative Law Judge entered an order closing the file.¹

5. Not long after the conclusion of the Webb case, the Owners submitted a second application to the Department for authorization to build a dock. As described in this second application (which gave rise to File 3), the newly proposed dock (hereafter, the "Redesigned Dock") differed somewhat from the Approved Dock. Most noticeably, the terminal platform of the Redesigned Dock faced north, towards Singer's property, whereas the terminal platform of the Approved Dock had faced south.

6. Singer and the Owners disagreed sharply as to whether the differences between the Approved Dock and the Redesigned Dock should be considered "substantial" (as Singer claims) or merely "minor" (as the Owners claim). For present purposes, however, it is neither necessary, nor would it be appropriate, to resolve that particular dispute.

7. What is significant and should be emphasized, however, is that whether or not the Redesigned Dock differed

substantially from the Approved Dock, the Owners submitted a new application respecting the Redesigned Dock as if it were a new project, and the Department acted upon the Owners' second application as if the first one had neither been made nor approved. Thus, in a letter dated February 28, 2001, which is included in File 3, the Department informed the Owners that it had reviewed their application "to determine whether [the Redesigned Dock] qualifies for any of three kinds of authorization that may be necessary for works in wetlands or waters of the United States." This February 28, 2001, letter constituted the second agency action ("Second Action" or "SA") concerning the Owners' dock (though it was, of course, the first agency action on the Redesigned Dock).

8. Like the First Action of the previous year, the Second Action was composed of three distinct determinations (again, "D1," "D2," and "D3" for short), one for each of the "three kinds of [potentially necessary] authorization[s]." These determinations were:

SA-D1: The re-designed dock is exempt from the need to obtain an ERP.

SA-D2: The re-designed dock qualifies for consent to use state sovereign submerged lands.

SA-D3: Pursuant to a "federal review" performed under an agreement between the Department and the U.S. Army Corps of Engineers, the re-designed dock is deemed not consistent with the SPGP program.²

The Owners did not cause notice of the Department's Second Action to be published in a newspaper of general circulation.

9. Armed with the Second Action, the Owners proceeded to have the Redesigned Dock constructed, and it now exists in fact. The existing structure will be referred to herein as the "As-Built Dock," which, to be clear, was constructed according to the blueprint of the Redesigned Dock.

10. After the construction began, Singer initiated this administrative litigation, the procedural history of which is summarized in the Preliminary Statement. In the course of the litigation, on May 17, 2002, the Department filed both a Motion to Dismiss and a Motion to Relinquish Jurisdiction. As the basis for its request that the undersigned relinquish jurisdiction over File 3—that is, the Department's file supporting the Second Action, which had approved the Redesigned Dock—the Department relied upon a letter dated May 16, 2002, from the Owners' counsel to the Department's counsel, which contained the following pertinent text:

Please accept this notice as the withdrawal of the application filed by Timothy and Hope Delong in the above matter [namely, File 3].

The Department (with the Owners' concurrence) contended that because the Owners had voluntarily withdrawn their application, the agency had lost jurisdiction to enter a final order implementing, modifying, or rescinding the Second Action, which

had preliminarily approved that application. See, e.g., City of North Port, Florida v. Consolidated Minerals, Inc., 645 So. 2d 485, 486-87 (Fla. 2d DCA 1994).

11. The undersigned agreed that, by withdrawing their application for approval of the Redesigned Dock, the Owners had divested the Department of jurisdiction in the matter. Accordingly, the undersigned relinquished jurisdiction over File 3.

12. In withdrawing their second application, the Owners materially changed their position and substantially modified the outcome of the most relevant preliminary agency action at issue, namely, the Second Action approving the Redesigned Dock. Indeed, by nullifying the Second Action, the Owners forfeited the only express authorization, albeit a preliminary one, that they had ever obtained from the Department for the Redesigned Dock. Thus, in other words, rather than defend the Department's preliminary approval of the Redesigned Dock in this proceeding, the Owners elected to rely upon the First Action as a defense against any future claim that the As-Built Dock is an illegal, unpermitted project.³

13. The Owners' withdrawal of their second application was intended to resolve, and in fact did resolve, matters raised in Singer's Petition. The undersigned specifically finds, as a matter of ultimate fact, that the Owners' change of position was

substantial for purposes of Section 120.595(1)(e)3., Florida Statutes.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569, 120.57(1), and 120.595(1), Florida Statutes.

15. An award of attorneys' fees and costs under Section 120.595(1), Florida Statutes, can be made in favor of "the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose." Section 120.595(1)(b), Florida Statutes (emphasis added).

16. The term "nonprevailing adverse party" is not synonymous with "losing party." Rather, Section 120.595(e)3., Florida Statutes, defines the term to mean:

a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing

proceeding to support the position of an agency.

(Emphasis added).

17. Singer is not a "nonprevailing adverse party" because, in fact, this proceeding resulted in a substantial modification of the Owners' position—their nullification of the Second Action preliminarily approving the Redesigned Dock—which was intended to and did resolve matters raised in Singer's Petition.

18. Because Singer is not a "nonprevailing adverse party" as a matter of fact, he cannot be assessed attorneys' fees and costs under Section 120.595(1), Florida Statutes, as a matter of law, regardless of the purposes for which he participated in this proceeding.

19. Accordingly, it is RECOMMENDED that the Department enter a Final Order denying the Owners' Motion for Attorneys' Fees and Costs.

DONE AND ENTERED this 31st day of March, 2003, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of March, 2003.

ENDNOTES

^{1/} The undersigned does not know whether the Department thereafter issued a Final Order disposing of the Webb case; such an order was not introduced into the record of the instant proceeding.

^{2/} The record does not disclose the reasons why the Redesigned Dock, in contrast to the Approved Dock, was deemed not consistent with the SPGP program.

^{3/} The undersigned is not suggesting that such a claim necessarily would have merit. Suffice it to say, however, it is not self-evident that the First Action approves the As-Built Dock, which—no one disputes—is different from the Approved Dock. Whether the differences are minor or substantial, which question goes to the heart of whether the As-Built Dock is properly permitted, is an issue that must be resolved, if ever, in another proceeding.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.