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DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

BEN WITHERS and BEN WITHERS, INC., )  
 )  
 Petitioners, )  
 )  
 vs. )  
 )  
 DEPARTMENT OF ENVIRONMENTAL )  
 PROTECTION, )  
 )  
 Respondent. )

AT

DOAH CASE NO. 02-0621  
OGC CASE NO. 01-1966

CAS-CLOS

BEN WITHERS and BEN WITHERS, INC., )  
 )  
 Petitioners, )  
 )  
 vs. )  
 )  
 DEPARTMENT OF ENVIRONMENTAL )  
 PROTECTION, )  
 )  
 Respondent. )

DOAH CASE NO. 02-0117  
OGC CASE NO. 01-1966

FINAL ORDER

On January 9, 2003, a Division of Administrative Hearings ("DOAH") Administrative Law Judge, Charles A. Stampelos ("ALJ"), submitted a Recommended Order in DOAH Case No. 02-0621. On January 9, 2003, the ALJ submitted a related Recommended Order of Dismissal in DOAH Case No. 02-0117. The two DOAH orders indicate that copies thereof were served upon counsel for the Petitioners, Ben Withers and Ben Withers, Inc. (collectively the "Petitioners"), and the Department of Environmental Protection ("DEP"). Copies of the Recommended Order and the Recommended Order of Dismissal are attached hereto as Exhibits A and B, respectively. The matters are now before the Secretary of DEP for final agency action.

## BACKGROUND

On October 21, 1999, DEP issued a Beaches and Coastal Systems permit to Leonard Pepper for the construction of a single-family dwelling seaward of the Coastal Construction Control Line ("CCCL") on Dog Island, Franklin County, Florida. Special Condition 1.5 required the submittal of a construction access plan, showing the route and timing for bringing equipment and materials to the site, in order to minimize impacts to the beach and dune system. In light of design changes to the proposed dwelling site, the Department subsequently issued an Amended Permit FR-563 to Mr. Pepper with the same access plan requirement.

The Petitioners were the building contractors hired by Mr. Pepper to construct his proposed dwelling on Dog Island. On March 15, 2001, the Petitioners submitted to DEP a construction access plan for the Amended Permit on behalf of Mr. Pepper. Shortly thereafter, DEP approved the access plan. On April 11, 2001, the Department issued a Notice to Proceed for the construction work to begin on the Pepper dwelling.

On May 7, 2001, the Department issued a Notice of Violation/Cease and Desist ("NOV") to the Petitioners for alleged unauthorized clearing and destruction of dunes and native vegetation for the purposes of constructing a roadway seaward of the CCCL without the benefit of a permit from the Department (the "narrows" violation). On May 8, 2001, the Department issued another NOV to the Petitioners for alleged unauthorized grading and excavation at the Pepper home project site (the "project site" violation).

On November 30, 2001, DEP issued a preliminary Final Order to the Petitioners, assessing an administrative fine of \$500.00 for the project site violation. The Petitioners challenged this administrative fine by filing a Petition for Administrative Hearing, which

was referred to DOAH for a formal administrative hearing. The matter was assigned DOAH Case No. 02-0117, and the ALJ was assigned to the case.

On January 11, 2002, the Department entered a separate preliminary Final Order to the Petitioners, assessing an administrative fine of \$7,500.00 and administrative damages of \$5,000.00 for the alleged narrows violation. The Petitioners also challenged this administrative fine and related damages by filing another Petition for Administrative Hearing. The matter was referred to DOAH and was assigned Case No. 02-0621. Case Nos. 02-0117 and 02-0621 were consolidated for a DOAH final hearing before the ALJ.

Prior to the DOAH final hearing, DEP issued a Rescission of Final Order pertaining to the alleged project site violation. DEP also filed a motion in DOAH Case No. 02-0117 requesting the ALJ to relinquish jurisdiction of this matter back to DEP. This unopposed Motion to Relinquish Jurisdiction back to DEP of the project site violation matter was granted. The ALJ also entered a related Order Closing File in Case No. 02-0117 on October 21, 2002. However, the ALJ reserved jurisdiction to consider a motion for an award of attorney's fees and costs, which could be filed by the Petitioners pursuant to § 57.111 and/or 120.595(1), Florida Statutes ("Fla. Stat.").

On October 9-10, 2002, the ALJ held a DOAH final hearing in Tallahassee. Evidence was presented in DOAH Case No. 02-0261 on the issue of whether there was illegal clearing and destruction of dunes and dune vegetation by the Petitioners in connection with the unauthorized construction of a roadway on DOG Island seaward of the CCCL. In Case No. 02-0117, the Petitioners also filed a motion for an award of attorney's fees and costs against DEP.

RECOMMENDED ORDER IN DOAH CASE NO. 02-0621

In his Recommended Order in DOAH Case No. 02-0621, the ALJ concluded that DEP “clearly and convincingly proved” at the final hearing that the Petitioners excavated and caused damage to the dunes and native vegetation seaward of the CCCL in the narrows area of Dog Island. The ALJ also concluded that the Petitioners “knowingly and wilfully violated Section 161.053(2), Fla. Stat., resulting in harm to the coastal or beach-dune system.” The ALJ recommended that a final order be entered directing that, within 30 days thereafter, the Petitioners shall pay a total sum of \$ 8,000.00 to DEP, consisting of a fine of \$ 3, 500.00 and damages in the amount of \$ 4,500.00.

RECOMMENDED ORDER OF DISMISSAL IN DOAH CASE NO. 02-0117

The sole matter considered by the ALJ in his Recommended Order of Dismissal in DOAH Case No. 02-0177 is the Petitioners’ Motion for Award of Attorney’s Fees and Costs against DEP under § 120.595(1), Fla. Stat. The ALJ recommended that DEP enter a final order dismissing this motion of the Petitioners. Section 120.595(1)(b), Fla. Stat., states that the “final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorneys fee to 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” (emphasis supplied).

The ALJ concluded in the Recommended Order of Dismissal that there was no “prevailing party” in DOAH Case No. 02-0177 within the purview of § 120.595(1), Fla. Stat. Furthermore, the Recommended Order of Dismissal does not contain a determination by the ALJ that DEP participated in DOAH Case No. 02-0177 “for an

improper purpose.” Consequently, the Petitioners are not entitled to an Award of Attorney’s Fees and Costs pursuant to § 120.595(1).

### CONCLUSION

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of administrative law judges by filing exceptions to the DOAH recommended orders. See Couch v. Commission on Ethics, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). In DOAH Case Nos. 02-0117 and 02-0621, the ALJ entered recommended orders clearly adverse to the claims of the Petitioners. Nevertheless, the Petitioners did not file any exceptions contesting any of the ALJ’s adverse factual findings, legal conclusions, or recommendations in the two DOAH orders.

Having considered the Recommend Order in DOAH Case No. 02-0621 and the Recommended Order of Dismissal in DOAH Case No. 02-0117, and being otherwise duly advised, it is ORDERED:

- A. The Recommended Order in DOAH Case Nos. 02-0621 (Ex. A) is adopted and incorporated by reference herein.
- B. The Recommended Order of Dismissal in DOAH Case Nos. 02-0117 (Ex. B) is adopted and incorporated by reference herein.
- C. The Petitioners’ Motion for Award of Attorney’s Fees and COSTS pursuant to § 120.595(1), Florida Statutes, is dismissed.

D. Within 30 days from the effective date of this Final Order, the Petitioners shall pay to the Department of Environmental Protection the total sum of \$ 8,000.00, consisting of a fine of \$ 3, 500.00 and damages in the amount of \$ 4,500.00.

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 21 day of February, 2003, in Tallahassee, Florida.

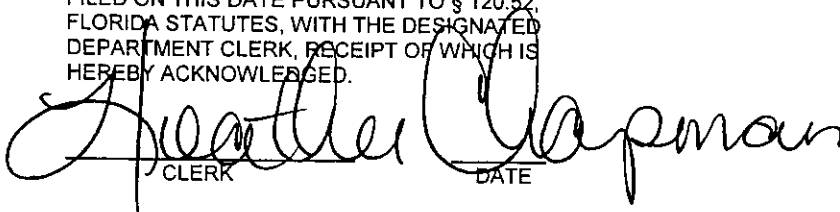
STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



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.

 2/24/03  
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:

Nicholas Yonclas, Esquire  
Post Office Box 386  
Eastpoint, FL 32328

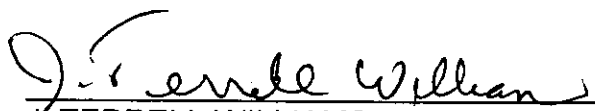
Ann Cole, Clerk and  
Charles A. Stampelos, Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, FL 32399-1550

and by hand delivery to:

Robert W. Stills, Jr., Esquire  
Department of Environmental Protection  
3900 Commonwealth Blvd., M.S. 35  
Tallahassee, FL 32399-3000

this 24<sup>th</sup> day of February, 2003.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

  
J. TERRELL WILLIAMS  
Assistant General Counsel

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