St. Johns River
Water Management District
Kirby B. Green III, Executive Director • David W. Fisk, Assistant Executive Director

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FILED
2006 AUG 14 A 11:46
DIVISION OF
ADMINISTRATIVE
HEARINGS

August 10, 2006

Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

Re: JAMES ADLEY V SJRWMD AND FRANCES MORRO
DOAH CASE NO. 05-3209

Dear Sir or Madam,

Pursuant to Section 120.57(1)(m), Florida Statutes, this agency is providing a copy of its Final Order and Exceptions to the Recommended Order to the Division of Administrative Hearings. The Final Order was filed on August 9, 2006, after the Governing Board's action on August 8th.

If you have any questions, please call me at (386) 329-4153.

Sincerely,

Stanley Niego
Sr. Assistant General Counsel
Office of General Counsel

SN:kp

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

JAMES ADLEY,

Petitioner,

v.

DOAH Case No. 05-003209
SJRWMD F.O.R. No. 2005-54

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, a state agency, and FRANCES MORRO, an individual,

Respondents.
_____/

FINAL ORDER

The Division of Administrative Hearings, by its duly designated Administrative Law Judge, the Honorable Donald R. Alexander ("ALJ"), entered a Recommended Order of Dismissal on July 10, 2006 pursuant to a Second Motion to Dismiss filed by Respondent, St. Johns River Water Management District (District), a copy of which is attached as Exhibit A. Petitioner, James Adley, untimely filed "Exceptions to the Recommended Order of Dismissal" on July 27, 2006. The District timely filed Responses to Exceptions. This matter then came before the Governing Board on August 8, 2006 for final agency action.

A. STATEMENT OF THE ISSUE

The issue is whether the petition for a formal administrative hearing regarding the application by Respondent, Frances Morro (Application No. 10-117-51722-2), to modify environmental resource permit ("ERP") No. 40-117-51722-1 should be dismissed for

failure to timely file said petition in accordance with Rule 40C-1.1007, Fla. Admin. Code.

B. STANDARD OF REVIEW

The rules regarding an agency's consideration of exceptions to a recommended order are well established. The Governing Board is prescribed by section 120.57(1)(l), Florida Statutes ("F.S."), in acting upon a recommended order. The ALJ, not the Governing Board, is the fact finder. Goss v. Dist. Sch. Bd. of St. Johns County, 601 So.2d 1232 (Fla. 5th DCA 1992); Heifetz v. Dep't of Bus. Regulation, 475 So.2d 1277 (Fla. 1st DCA 1997). A finding of fact may not be rejected or modified unless the Governing Board first determines from a review of the entire record that the finding of fact is not based upon competent substantial evidence or that the proceedings on which the finding of fact was based did not comply with essential requirements of law. Section 120.57(1)(l), F.S.; Goss, supra. "Competent substantial evidence" is such evidence as is sufficiently relevant and material that a reasonable mind would accept such evidence as adequate to support the conclusion reached. Perdue v. TJ Palm Associates, Ltd., 755 So.2d 660 (Fla. 4th DCA 1999). The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, but refers to the existence of some quantity of evidence as to each essential element and as to the legality and admissibility of that evidence. Scholastic Book Fairs v. Unemployment Appeals Commission, 671 So.2d 287, 289 (Fla. 5th DCA 1996).

If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. Freeze v. Dep't of

Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990); Berry v. Dep't of Envtl. Regulation, 530 So.2d 1019 (Fla. 4th DCA 1998). The Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, and may not judge the credibility of witnesses or otherwise interpret evidence anew. Goss, supra; Heifitz, supra; Brown v. Criminal Justice Standards & Training Comm'n., 667 So.2d 977 (Fla. 4th DCA 1996). The issue is not whether the record contains evidence contrary to the findings of fact in the recommended order, but whether the finding is supported by any competent substantial evidence. Florida Sugar Cane League v. State Siting Bd., 580 So.2d 846 (Fla. 1st DCA 1991).

In its final order, the Governing Board may reject or modify the conclusions of law or interpretations of administrative rules over which it has substantive jurisdiction, provided the reasons therefor are stated with particularity and the Governing Board finds that such rejection or modification is as or more reasonable than the ALJ's conclusion or interpretation. Section 120.57(1)(l), F.S. The Governing Board's authority to modify a recommended order does not depend upon exceptions being filed. Westchester General Hospital v. Dept. Human Res. Services, 419 So.2d 705 (Fla. 1st DCA 1982).

In issuing its final order, the Governing Board need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S.

C. RULINGS ON PETITIONER'S EXCEPTIONS[1]

1. Timeliness of Exceptions

Pursuant to section 120.57(1)(k), F.S. and Rule 28-106.217(1), Fla. Admin. Code, the parties were required to file exceptions to the Recommended Order by no later than 5:00 p.m. on July 25, 2006. The District Clerk does not accept filings by fax and Petitioner was advised thereof, along with the requisite filing date by letter dated July 14, 2006, attached as Exhibit B. Petitioner served a copy of his exceptions upon opposing counsel at the District via fax on July 25, 2006 at 4:38 p.m. However, Petitioner did not file his exceptions with the District Clerk until July 27, 2006. The late filing of exceptions is not jurisdictional, and the District may excuse such late filing upon a proper showing of excusable neglect in the absence of any prejudice to the other parties to the proceeding. Hamilton County Board of County Commissioners v. Dept. of Environmental Regulation, 587 So.2d 1378, 1389-90 (Fla. 1st DCA 1991); Department of Environmental Protection v. Puckett Oil Company, Inc, 577 So.2d 988 (Fla. 1st DCA 1991). A proper showing of excusable neglect requires an affidavit stating the facts that provide grounds therefor. Worldwide Investment Group, Inc. v. Department of Environmental Protection, 1998 WL 460183 (Final Order entered June 19, 1998).

Petitioner has submitted an affidavit stating the reasons for the late filing of exceptions, attached as Exhibit C. In view of Petitioner's effort to transmit the

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[1] Citations to the Recommended Order will be designated by "R.O." followed by the abbreviation "FOF" (Finding of Fact) or "COL" (Conclusion of Law) and paragraph number (e.g., R.O., FOF 13). Citations to the Statement of Stipulated Facts filed by the parties on June 16, 2006 and the Exhibits filed on June 19, 2006 and June 26, 2006 shall be: (Stipulated Fact No. ___ , Exhibit ___).

exceptions to the District Clerk and the fact that a copy of Petitioner's exceptions was sent by fax to counsel for the District on the due date, the Governing Board concludes that grounds for excusable neglect exist and the District was not prejudiced by said late filing in this case. Petitioner's exceptions shall, therefore, not be rejected on this basis.

2. Form of Exceptions

Petitioner's exceptions fail to comply with Section 120.57(1)(k), F.S. Petitioner has failed to take exception to any specific finding of fact or conclusion of law in the Recommended Order. Instead, Petitioner's "Exceptions" are divided into separate sections based upon: (I) Doctrine of Equitable Tolling; (II) Notice to Petitioner; (3) Denial of Constitutional Rights; (4) Due Process; (5) Due Process Standards; (VI) Clear Point of Entry, and (VII) Waiver. Because this matter was decided based upon a "Statement of Stipulated Facts," it is unlikely that Petitioner is challenging any of the factual findings. In any case, no findings of fact have been identified by Petitioner's exceptions, and, therefore, the Governing Board cannot enter any ruling modifying or rejecting the ALJ's findings of fact. It appears from these exceptions that Petitioner generally objects to the ALJ's application of the law to these facts in dismissing the petition. However, Petitioner, not having identified the specific portion(s) of the ALJ's conclusions of law that is/are subject to exception, the Governing Board must speculate as to what matter(s) are subject to exception, which it cannot do. Therefore, Petitioner's exceptions are rejected for failure to comply with section 120.57(1)(k), F.S.

3. Alternative Ruling on Petitioner's Exceptions

For the purpose of appellate review in the event the appellate court should determine that the District should have ruled upon Petitioner's exceptions, the Governing Board makes the following conclusions of law. The Governing Board does not make any ruling regarding the applicability of the equitable tolling doctrine to the facts herein, which is outside the District's substantive jurisdiction. Save The Manatee Club, Inc. v. Whitley, 24 F.A.L.R. 1271 (DEP), aff'd, 812 So.2d 412 (Fla. 1st DCA 2001). Nor, for the same reason, does the Governing Board make any ruling regarding the procedural aspects of the proceedings before the ALJ. Barfield v. Department of Health, 805 So.2d 1008 (Fla. 1st DCA 2001); Cutter v. Department of Environmental Protection, 28 F.A.L.R. 518 (DEP 2005) (agency lacks substantive jurisdiction over ALJ's rulings regarding substitution of parties, mootness and intervenor status); Rondolino v. Department of Environmental Protection, 24 F.A.L.R. 4081 (DEP 2002) (ruling that petitioner withdrew claim is a procedural matter over which agency lacks substantive jurisdiction).

Petitioner also raises arguments in his exceptions involving "Denial of Constitutional Rights," (¶ 3), "Due Process" (¶ 4) and "Due Process Standards" (¶ V). These arguments are not reflected in Petitioner's November 28, 2005 "Response to Second Motion to Dismiss and First Motion to Strike," being raised for the first time in Petitioner's exceptions. The ALJ has not had an opportunity to address these issues to the extent they are within the jurisdiction of the Division of Administrative Hearings. Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So.2d 695 (Fla.

1978). In any case, constitutional issues lie outside the Governing Board's substantive jurisdiction.

Aside from application of the equitable tolling doctrine, there are two central legal questions in this case, being: (1) whether publication of notice by an applicant is an adequate substitute for a petitioner's lack of receipt of written notice of intended agency action from the agency when the petitioner has requested such notice in writing, and (2) if not adequate, whether actual notice of construction by the petitioner is an adequate substitute for such notice. These questions involve application of chapter 373, F.S., and District rules, which are within the Governing Board's substantive jurisdiction.

Publication of Notice

It is stipulated fact that the applicant submitted a written request for notice of intended agency action from the District (Stipulated Fact No. 6, Exhibit B). The District assured Petitioner that he would be provided such notice (Stipulated Fact Nos. 12 - 15; Exhibits I, J, K, L) and provided Petitioner with written notice of the application for permit modification (Stipulated Fact No. 18, Exhibit M) and two letters requesting additional information regarding said application (Stipulated Fact No. 19, Exhibits N and O). However, notice was not provided of the intended action to issue the permit, which was issued on March 30, 2005 (Stipulated Fact No. 31, Exhibit Q). The applicant, however, published notice of the agency action issuing the permit in the Sanford Herald on April 10, 2005 (Stipulated Fact No. 25; Exhibit R).

Section 373.413(4), F.S., provides in pertinent part:

> The governing board or department shall also provide notice of this intended agency action to the applicant and to persons who have requested a copy of the intended agency action for that specific application.

In addition, section 120.60(3) provides in pertinent part regarding the notice of intended agency action:

> Unless waived, a copy of the notice shall be delivered or mailed to each party's attorney of record and to each person who has requested notice of agency action.

The District argues, however, that publication of notice by the applicant constitutes a separate form of notice that is independent of statutory written notice, and that it would unduly prejudice the rights of the applicant if the applicant published such notice and was then subject to administrative proceedings after the time for an administrative hearing expired pursuant to the applicant's notice due to a failure by the agency to comply with the above provisions. The District argues:

> The statutes that Adley cites that require the District to provide actual notice do not negate what Morro, as the applicant, can do to establish a point of entry. The Wentworth[2] Court repeatedly makes mention of the fact that Wentworth, nor anyone else, published newspaper notice. Irrespective of whatever the statutes may require the District to do as far as actual notice upon written request, Morro has the right to establish a time window for persons whose substantial interests may be affected to file a petition. Adley's requesting actual notice from the District cannot negate Morro's right to establish a point of entry. Hence, whether or not the District gave Adley actual notice is irrelevant. Morro's rights are separate and aside from any duty owed by the District. It is implicit in Wentworth that Morro's noticing in the newspaper is the only relevant fact as to timeliness of Adley's petition.

[2] [Wentworth v. State, Dep't of Environmental. Protection, 771 So. 2d 1279 (Fla. 4th DCA 2000)]

District Response to Exceptions, ¶ 11. The District's argument raises equitable considerations on behalf of the applicant, who is without fault, and may incur substantial costs if intended issuance of a permit is subsequently modified through an administrative hearing at some indeterminate point in the future due to the District's failure to comply with the above statutes. In this case the applicant had completed construction of the modification before the petition for administrative hearing was filed (R.O., FOF Nos. 25, 32). On the other hand, however, it is reasonable to conclude that a potential third-party petitioner submits a written request for notice of intended agency action and relies thereon in order to avoid having to read the legal advertisements every day in all of the potential newspapers in which publication may be made in order to ascertain when the point of entry opens for requesting an administrative hearing. In addition, the above-referenced statutes require that written notice of intended agency action be provided upon submittal of a request therefor.

The ALJ's conclusions of law did not discuss the District's argument. Instead, the ALJ concluded that after April 25, 2005, when the Petitioner had actual notice of the construction activity, the doctrine of equitable tolling did not apply (R.O., COL No. 41). The inference from the ALJ's ruling is that Petitioner was entitled to equitable tolling based upon the District's failure to provide written notice. The ALJ, therefore, appears to have decided the above legal issue in favor of the Petitioner's equities, but limited the application of equitable tolling to April 25, 2005 based upon Petitioner's failure to timely request an administrative hearing after actual notice of the activity. Pursuant to the notice that was published on April 10, 2005, a petition could have had to be filed up to May 1, 2005 (R.O.; FOF No. 23). By applying equitable tolling, the point of entry opened on April 25, 2005

and closed on May 16, 2005. Thus, the ALJ applied equitable tolling in this case to extend the point of entry for fifteen days. This application was immaterial to the outcome because the petition was not filed until August 15, 2005.

Therefore, it is not necessary to reach the argument raised by the District that Petitioner is subject to the published notice and not entitled to equitable tolling based upon the District's failure to provide written notice. This is because the existence of actual notice is dispositive of the petition irrespective of whether the District's argument is correct or not. If the District is correct, the expiration date for filing a petition was May 1, 2005. However, even if the District's argument is not correct, the 21-day period for filing a petition expired on May 16, 2005, well in advance of the date the petition was filed. Lastly, to the extent the ALJ applied equitable tolling, this lies outside the District's substantive jurisdiction and may only be addressed by the appellate court.

Actual Notice

Although there is no mention in Rule 40C-1.0007, Fla. Admin. Code, of actual notice being sufficient to commence the point of entry for administrative proceedings, actual notice of construction has been judicially recognized as sufficient to commence the point of entry, Wentworth, supra, at 1281. However, actual notice of construction is not, in and of itself, sufficient notice to commence the point of entry. As noted by the ALJ:

> In order to trigger a point of entry, actual notice must also include "knowledge of the hearing rights flowing from agency action, not just knowledge of the project's existence, or even knowledge of an agency's permitting activity in conjunction with the project."

[COL No. 38, citing, Terwilliger et al. v. South Florida Water Management District et al, DOAH Case No. 01-1504 (DOAH Feb. 27, 2002; SFWMD April 15, 2002); LEXIS 149 at *73].

On the basis of the Stipulated Facts, the ALJ determined that the Petitioner had actual notice of the construction of the retaining wall authorized by the permit modification when the construction started on April 25, 2005 (R.O., FOF No. 26), and that Petitioner's attorney inquired of District staff shortly thereafter, which investigated the activity and reported back to Petitioner's attorney within a short period of time (R.O., FOF Nos. 27 and 28). Within a day or so thereafter, Petitioner's attorney reported back to Petitioner that the activity was in conformance with the permit (R.O., FOF No. 29). The ALJ then inferred that these discussions related to the 2005 permit modification, as opposed to the original 1999 permit (R.O., FOF No. 29). With regard to notice of hearing rights, the ALJ concluded based upon "the totality of the evidence" that Petitioner's knowledge of the activities at the site, "coupled with his understanding of the ERP process, should have provided him with knowledge of the hearing rights flowing from the agency action." (R.O., COL No. 40). This evidence included the fact that Petitioner had received the District's Notice of Rights with the permit modification application (R.O., FOF No. 17; Stipulated Fact No 18; Exhibit M); Petitioner had requested notice of intended agency action (Stipulated Fact No. 6, Exhibit B); and Petitioner was familiar with the ERP permitting process, having had ownership interests in businesses that have obtained ERPs from the District, and having participated in the activity undertaken to obtain the permits and then implement the activity authorized thereby (R.O., FOF No. 4).

The Governing Board lacks the authority to reject reasonable inferences that are made by the ALJ. Smith v. Dep't of Health & Rehabilitative Serv., 555 So.2d 1254, 1255 (Fla. 3d DCA 1990). As stated in Heifetz v. Department of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985), "It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." The inferences that were made by the ALJ herein to reach the conclusions described above are reasonable and based upon the stipulated facts.

Therefore, there is no basis to reject or modify the ALJ's conclusion that Petitioner had actual notice of the construction activity (along with his administrative hearing rights) on April 25, 2005. The existence of such actual notice commenced the point of entry for filing a petition, which expired 21 days later on May 16, 2005. The petition was not filed herein until August 15, 2005 (R.O., FOF No. 32) and, therefore, is untimely filed on this basis.

FINAL ORDER

ACCORDINGLY, IT IS HEREBY ORDERED:

The Recommended Order dated July 10, 2006, attached hereto as Exhibit "A", is adopted in its entirety and the Amended Petition for Administrative Hearing is hereby dismissed.

DONE AND ORDERED this 8th day of August, 2006, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: _____
KIRBY B. GREEN III
EXECUTIVE DIRECTOR

RENDERED this 9 day of ~~September, 2005.~~ August, 2006

BY: _____
ROBERT NAWROCKI
DISTRICT CLERK

Copies to:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMIE ADLEY,

Petitioner,

DOAH Case No. 05-3209
SJRWMD F.O.R. No. 2005-54

vs.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, a State agency, and FRANCES MORRO, an individual,

Respondents.
_____/

EXCEPTIONS TO RECOMMENDED ORDER OF DISMISSAL

The Petitioner, JAMIE ADLEY, hereby files these Exceptions to the Recommended Order of Dismissal pursuant to Florida Administrative Code Rule 28-106.217 and related administrative regulations, and in support thereof states as follows:

I. Doctrine of Equitable Tolling

1. The doctrine of equitable tolling depends on factual allegations that remain nothing more than issues of fact at this point, as counsel for the District admits. See Statement of Stipulated Facts filed previously. See also Amended Petition at paragraphs 5-6 (setting forth two issues of fact relating to the failure of the District to provide statutorily required notice and to representations of the District constituting a basis for applying the doctrine of equitable tolling to deem the petition timely filed in this case). The Amended Petition alleges that representatives of the District told Petitioner or his representative on numerous occasions that it would provide him with mailed written notice (emphasis supplied) of its intended or actual final agency action, based on his

repeated requests for such notice and on the requirement of §120.60(3) of the Florida Statutes. Each applicant shall be given written notice either personally or by mail that the agency intends to grant or deny, or has granted or denied, the application for license. The notice must state with particularity the grounds or basis for the issuance or denial of the license, except when issuance is a ministerial act. Unless waived, a copy of the notice shall be delivered or mailed to each party's attorney of record and to each person who has requested notice of agency action (emphasis supplied). At no time did the Statement of Stipulated Facts allege or assert by the District that the issuance of the permit modification at issue was a ministerial act. The Amended Petition and Statement of Stipulated Facts alleges that Petitioner solely relied on the District's representations and on the statute in question, and that the District ostensibly approved the permit modification on March 30, 2005, but provided no such mailed notice to Petitioner. The District never provided any notice of modification of the permit at issue as described herein. The District has provided no evidence of such mailing. See paragraph 31 of the Statement of Stipulated Facts. As the court in Avante v. Agency for Health Care Administration stated, these allegations are "facially sufficient to provide an equitable basis to excuse the delay in filing." See Avante, 722 So.2d 965, 966 (Fla. 1st DCA 1998); See also Foley v. Florida Department of Health, 839 So.2d 828, 828-29 (Fla 4th DCA 2003) (substituted opinion on motion for rehearing and clarification) (agency confessed error in revoking certificate without hearing despite agency attorney's previous agreement to accept filing of otherwise late election-of-rights form). In this instance, prior counsel for the Petitioner as well as the Petitioner repeatedly requested written notice of final agency action which was never provided by the District by its own

admission. The Statement of Stipulated Facts clearly establish the Petitioner's right to the issue of whether the doctrine of equitable tolling should be applied herein, based on the Stipulated Statement of facts. See Avante, 722 So.2d 965, 966 (Fla. 1st DCA 1998). The doctrine of equitable tolling is not dispositive of the issue of timeliness in this case in that the District was on notice as described herein and responded in writing as described herein that the Petitioner would specifically receive notice of final agency action. To be further exemplified as to the absence of notice is that the District did not provide final agency action on specific permitting approval issues but rather provided Petitioner as set forth in the record and described in the Statement of Stipulated Facts that it was unclear the information provided Petitioner for which he may or may not have challenged final agency action creating a point of entry. Based on the statement of William Carlie.

II. Notice to Petitioner

2. This position of the court is consistent with the general and well-settled principle that on a motion to dismiss, a judge must take the allegations of the complaint as true and rule on the legal sufficiency of its allegations. The same principle applies in administrative procedure, under which an Administrative Law Judge ruling on a motion to dismiss looks only to the four corners of the petition and its incorporated attachments, rather than considering any other factual evidence or allegations by making a new set of allegations specifically based upon the numerous representations of the St. Johns River Water Management District ("District") as actual notice of any modification to the 1999 Permit. Petitioner repeatedly requested written notice and received confirmation of same from the District regarding any modification to the 1999 Permit of Respondent. As stated below, the District has interjected the issue of constructive notice as opposed to actual

notice which is required by Statute. Quite simply, the entire dispute as to timeliness could have been resolved by the District sending to the Petitioner a certified letter, return receipt requested, acknowledging that the intended final agency action of the District would be as stated in such letter. The District failed to send such a letter as well as allowed the Respondent, applicant, to publish a notice in a newspaper of questionable circulation in that the Orlando Sentinel was the primary newspaper that the Petitioner would have received and reviewed. The issue of newspaper notice is arguably irrelevant in that the Petitioner, as stated above, repeatedly requested written notice as did his legal counsel of any final agency action whether such action be an authorization or denial of the permit modification which was never sent to the Petitioner or his counsel. The District has provided no written documentation that the legal counsel for Petitioner received directly any such notice of authorization or denial of the sought permit modification of Morro. See St. Francis Parkside Lodge of Tampa Bay v. Department of Health & Rehabilitative Services, 486 So.2d 32, 34 (Fla. 1st DCA 1986). As noted above, Petitioner Adley's Amended Petition and Statement of Stipulated Facts states material issues of fact concerning the right of Petitioner to rely on the representations of staff promising that he would be given personal mailed notice as required by §120.60(3) of the Florida Statutes. But the District's Second Motion to Dismiss (which is irrelevant) goes beyond the allegations of the Amended Petition and "answers" them by making a new set of allegations relating to actual constructive notice, which is not controlling as to the issue of constructive notice. Florida Statutes clearly provide that Adley was to receive written notice of final agency action. The St. Johns River Water Management District is not provided regulatory discretion under relevant case law regarding interpretation of

statutory provisions that are not technical or ecological in nature. Rather, the statute clearly provides as set forth in Fla. Stat. §120.60(3) that Adley was to receive written notice as requested and as confirmed by numerous District staff over a period of several years. The District has now interwoven the concept that notice to the legal counsel for the Petitioner who now is an attorney for the District, constitutes notice as to all of the activities allegedly authorized by the modification to the 1999 permit for which Petitioner received no "actual" notice and for which the Petitioner was promised on numerous occasions as discussed herein that written notice would be provided Petitioner of any final agency action as to the District. In effect, the District's Second Motion to Dismiss which is irrelevant to the issue of dismissal asks the ALJ to depart from well-established precedent governing the decisions on such motions. See, e.g., Pizzi v. Central Bank & Trust Co., 250 So.2d 895, 897 (Fla. 1971) (decision on motion to dismiss must accept factual allegations of petition as true and not go beyond the four corners of the petitioner) (cited in St. Francis Parkside Lodge, 486 So.2d 34, as applying to cases under the Florida Administrative Procedure Act). The attempt by the Administrative Law Judge to now impute knowledge of the entire file of the St. Johns River Water Management District to the Petitioner is contrary to the numerous requests of Petitioner for actual notice of final agency action and further, the District has cited in the exhibits to the Statement of Stipulated Facts references to numerous legal obligations imposed upon the District to provide Petitioner actual notice of final agency action.

III. Denial of Constitutional Rights

3. The Statement of Stipulated Facts dated June 16, 2006 and exhibits related thereto clearly indicate that Petitioner was advised repeatedly by numerous

representatives of the St. Johns River Water Management District regarding "actual" notice of any modifications to the 1999 Permit (Permit No. 40-117-51722-1), as modified. See paragraphs 9, 10, 11, 12, 13, 14, and 15. The repeated references do not render the requirement of the District to provide notice to the Petitioner a legal nullity. The numerous verbal, electronic transmission, and written notices from the District that Petitioner would receive "personal" knowledge as to the decision of the District regarding proposed permit modifications is indicative of the knowledge of the District of an issue in dispute. The letters in question and verbal and electronic mail transmissions for several years of notice to Petitioner of the intended approval of any permit modification does not constitute an appropriate legal point of entry under Chapter 120, Florida Statutes specifically because the Petitioner requested in writing actual notice and received from the District correspondence that he would receive actual notice of a legal point of entry. In fact, it appears that the District has now changed the legal position again to state that since the attorney at that time for Mr. Adley was provided an opportunity to review the files in Altamonte Springs, Florida and Palatka, Florida for this project, legal notice and a point of entry was therefore provided Petitioner. The fact that the attorney for Mr. Adley at the time was provided the opportunity to review files, contents of which are undocumented, does not constitute constructive notice superior to the actual notice requested repeatedly by Mr. Adley and his counsel. The Statement of Stipulated Facts evidences an omission from the St. Johns River Water Management District ("District") that Petitioner or his counsel never received the mailed notice of the District's intended action that he requested in writing and as the District had repeatedly promised to provide as stated above. In that regard, despite repeatedly requesting in writing a point of entry to

initiate a Chapter 120 legal proceeding, Petitioner never received the same constituting a denial of his due process rights under the federal and state constitutions.

IV. Due Process

4. Essential to the right of due process in administrative proceedings are notice and an opportunity to be hard and to defend, in an orderly proceeding before a tribunal having jurisdiction over the cause. However, the due process of law required in administrative proceedings is not synonymous with judicial process. Due process in administrative matters is a flexible concept, varying with the nature of the interests at stake in the particular proceeding. See, Hadley v. Department of Administration, 411 So.2d 184 (Fla. 1982) (called into doubt on other grounds by Tomlinson v. Department of Health and Rehabilitative Services, 558 So.2d 62, 15 F.L.W. D324 (Fla. Dist. Ct. App. 2d Dist. 1990))); Varney v. Florida Real Estate Com'n, 515 So.2d 383, 12 F.L.W. 2601 (Fla Dist. Ct. App. 5th Dist. 1987). Due to the absence of legal notice, the Petitioner was not provided due process in accordance with Fla. Statutes §120 as cited above and therefore constitutes grounds for proper notice by the District as to the intended agency action.

V. Due Process Standards

5. The Florida Administrative Procedure Act ("APA") prescribes the process by which stipulated facts are found in agency adjudicatory proceedings, and establishes minimum due process requirements for the adjudication of any party's substantial interests by an agency (emphasis supplied). It is axiomatic that the substantial interests of Petitioner are not an issue in this matter and that prior pleadings have never asserted a concern of the District that Petitioner is not substantially affected by the intended final agency action. Further, the due process standards have been obviated by the District in

that not only did the Petitioner, but also the Petitioner's counsel, repeatedly requested written notice at the time of final agency action as intended by the District. Though Fla. Stat.§120 sets forth minimum due process requirements, in this instance, the repeated requests by Petitioner and Petitioner's counsel for actual notice was not responded to in any timely manner by the District despite the repeated written correspondence from the District that a timely response and point of entry would be supplied. See, State Department of Administration v. Stevens, 344 So.2d 290 (Fla. Dist. Ct. App. 1st Dist. 1977); Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973). A point of entry was not supplied and therefore the Petition at issue was timely and any dismissal of same is a violation of the Florida and Federal constitutions.

VI. Clear Point of Entry

6. Failure to provide notice of agency action and a clear point of entry into the administrative process is a material error which may render the agency action invalid, or preclude dismissal of a hearing request for untimeliness predicated upon such notice. Based on the case citations and discussions above, it is axiomatic that Petitioner was not provided a clear point of entry. Petitioner clearly requested and received notification from the District that final agency action, when and if determined by the District, would be provided Petitioner in writing. The District has admitted that no such written notification was provided Petitioner and instead, attempts to argue that Petitioner had constructive notice of the intended agency action of the District. See, FFEC-Six, Inc. v. Florida Public Service Com'n, 425 So.2d 152 (Fla. Dist. Ct. App. 1st Dist. 1983); Brookwood Extended Care Centers, Inc. v. State Department of Health and Rehabilitative Services, 453 So.2d 865 (Fla. Dist. Ct. App. 1st Dist. 1984); Sterman v. Florida State

University Bd. Of Regents, 414 So.2d 1102 (Fla. Dist. Ct. App. 1st Dist. 1982); Henry v. State Dept. of Admin., Div. Of Retirement, 431 So.2d 677 (Fla. Dist. Ct. App. 1st Dist. 1983); Wahlquist v. School Bd. Of Liberty County, 423 So.2d 471 (Fla. Dist. Ct. App. 1st Dist. 1982).

It was agreed that the notice of final agency action intended by the District was published in The Sanford Herald on April 10, 2005. The Petitioner does not live in the proximity of Sanford, Florida and due to the repeated requests of Petitioner regarding notice, the more appropriate publication should have been published in the Orlando Sentinel at the same time. Such publication was never contemplated by or completed by the applicant. Further, the Administrative Law Judge attempts to impute the ability of the attorney for Petitioner who now is an attorney for the District as constructive notice to Petitioner as described herein. Florida Statutes do not allow imputing notice in such a manner when an interested party specifically requests written notice, and receives confirmation of the same from a regulatory agency.

As to a clear point of entry regarding permit compliance, paragraph 29 of the Statement of Stipulated Facts clearly states that the District representative reported to the attorney for Petitioner that construction was in conformance with a permit but did not specify whether or not the construction was in compliance with the 1999 Permit or the modification related thereto.

VII. Waiver

7. A party who fails to timely request an agency adjudicatory hearing may be considered to have waived the right to one if the party has received adequate notice of such right and of the necessity to request a hearing. An agency seeking to establish

waiver of the right to a hearing based upon the passage of time following agency actions claimed as final must show that the party affected by such action has received notice sufficient to commence the running of the time period within which a hearing may be sought. Based on the above discussion, despite numerous requests, Petitioner was not provided a point of entry to commence a Chapter 120 administrative hearing and the District has failed to justify any rationale why over the several years of requested notice by Petitioner, the District failed to simply send a letter by certified mail or a facsimile documenting final agency action as to the modification to the 1999 Permit. Absent any documentation from the District regarding notice and the absence of an admission in the Statement of Stipulated Facts by the agency of the absence of notice, the doctrine of waiver to timely filing by Petitioner is moot.

VIII. Procedural Error by the Administrative Law Judge

8. The Administrative Law Judge was advised by letter and motion that the parties would attempt to submit Stipulated Facts regarding this matter. The Administrative Law Judge was also placed on notice that the parties would then be filing proposed recommended orders and conclusions of law or equivalents thereto based upon the facts as stipulated by the parties.

9. Despite this representation to the Administrative Law Judge, the Administrative Law Judge entered an Order dated July 10, 2006, only 24 days after submission of the Stipulated Facts. Neither party was afforded an opportunity, especially the Petitioner, constituting a denial of due process as well as direct contravention of the administrative rights of the Petitioner to present arguments from a legal standpoint regarding the Stipulated Facts. The first page of the Recommended Order of Dismissal

states that the Administrative Law Judge relied upon the previously filed Motions to Dismiss, which predated the Stipulated Facts by several months. Therefore, the due process rights of Petitioner were obviated by the Court and therefore should be remanded for an Amended Recommended Order based upon the written arguments of the parties.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Vance W. Kidder, Esquire, St. Johns River Water Management District, 4049 Reid Street, Palataka, Florida 32177-2529 via Facsimile and U.S. Mail; and Frances Morro, 885 Cutler Road, Longwood, Florida 32779, by U.S. Mail this 25th day of July, 2006.

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