

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FILED
2008 AUG 11 P 12:04
DIVISION OF
ADMINISTRATIVE
HEARINGS

OLD PELICAN BAY III ASSOCIATION, INC.,)
)
 Petitioner,)
)
 vs.)
)
 TERRY CARLSON and DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
)
 _____)
)

OGC CASE NO. 07-2712
DOAH CASE NO. 08-0510

FINAL ORDER

On June 27, 2008, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order ("RO") to the Department of Environmental Protection ("Department" or "DEP") in the above captioned proceeding. A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were served to the qualified representative for the Petitioner, Old Pelican Bay III Association, Inc. ("Petitioner"). Copies were also served to counsel for the Co-Respondents, Terry Carlson ("Carlson") and the Department. The Petitioner filed a "Written Exception To Final Order" on July 14, 2008. The Department filed its Response on July 21, 2008. This matter is now on review before me for final agency action.

BACKGROUND

On April 27, 2007, Respondent Carlson filed with the Department an application to modify a single-family dock in a man-altered waterbody in Lee County, Florida. The property is located at 18570 Deep Passage Lane, which is at the base of a peninsula which extends for about one-half mile south of Siesta Drive, a roadway that appears to be in an unincorporated area of Lee County between the Cities of Fort Myers and Fort Myers Beach. On May 8, 2007, the Department issued a letter advising Mr. Carlson that based upon information supplied in his application; the project was determined to be exempt from Department permit requirements. The letter also constituted "authorization to use state owned submerged land for the construction of [his] project."

On December 26, 2007, Petitioner filed a letter petition requesting a hearing to contest the Department's preliminary determination on several grounds, including allegations that the dock and pilings would create a navigational hazard and that the project had changed from what was originally submitted to the Department and was no longer exempt. The matter was forwarded to DOAH on January 28, 2008, with a request that an administrative law judge be assigned to conduct a hearing. On May 16, 2008, the Department issued a revised letter. The second letter was issued because of a determination by the Department that "the project, as described, does not involve the use of sovereignty submerged lands" and therefore proprietary authorization was not required. The hearing was conducted on June 12, 2008, in Fort Myers. The parties filed proposed orders but a hearing transcript was not filed with DOAH. The ALJ subsequently issued his RO on June 27, 2008.

In the RO the ALJ stated that the issue for hearing was whether Mr. Carlson's application to construct and install a single-family dock is exempt from the need for an Environmental Resource Permit ("ERP"). The ALJ found that, by a preponderance of the evidence, Mr. Carlson established that the project will not create a navigational hazard within the meaning of the applicable statute and rule. See § 403.813(2)(b), Fla. Stat. (2007); Fla. Admin. Code R. 40E-4.051(3)(b). Further, the ALJ deemed the remaining statutory criteria satisfied because they were not in dispute. (RO ¶ 24). Therefore, the ALJ recommended that the Department enter a final order determining that Mr. Carlson's project is exempt from the need to obtain an ERP permit. (RO page 20).

STANDARDS OF REVIEW

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. See e.g., *Scholastic Book Fairs, Inc. v. Unemployment Appeals Commission*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. See e.g., *Belleau v. Dept. of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County School Board*, 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. See e.g., *Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. See e.g., *Collier Medical Center v. State, Dept. of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Florida Chapter of Sierra Club v. Orlando Utilities Commission*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." See § 120.57(1)(k), Fla. Stat. (2007). However, I 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." *Id.* In addition, as noted above, I am prohibited from rejecting or modifying findings of fact in a recommended order, unless I review the "entire record" of the proceedings before the ALJ. The case law construing this provision has consistently held that a reviewing agency should not reject the findings of fact of a DOAH ALJ where the party disputing the findings of fact has failed to furnish to

the reviewing agency a complete transcript of the DOAH proceedings. See, e.g., *Rabren v. Dept. of Professional Regulation*, 568 So.2d 1283 (Fla. 1st DCA 1990); *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1st DCA 1987).

RULINGS ON PETITIONER'S EXCEPTIONS

Petitioner filed a "Written Exception to Final Order" on July 14, 2008, containing three numbered paragraphs followed by several unnumbered paragraphs. The numbered paragraphs will be ruled on below.

Exception No. 1

The Petitioner takes exception to a Google aerial map that was admitted into evidence at the hearing. The Petitioner contends that the map is over five years old and it does not take into account two Category 4+5 hurricanes that allegedly changed the footprint of the surrounding mangroves and estuaries. The Petitioner argues that the ALJ failed to address or explain why this evidence was acceptable. Since the Petitioner failed to furnish a complete transcript of the DOAH hearing when this exception was filed I am not able to determine the basis for the ALJ's evidentiary ruling. In addition, evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which I have "substantive jurisdiction." See *Martuccio v. Dept. of Professional Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Such evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and

may not be reversed on agency review. See *Martuccio, supra*, at 609. Therefore, the Petitioner's Exception No. 1 is denied.

Exception No. 2

The Petitioner takes exception to the ALJ's evidentiary ruling regarding a home video that was not admitted into evidence. Essentially, the Petitioner's exception challenges the ALJ's notation in Endnote 4 describing a procedure for providing to the ALJ and other parties a copy of the proffered home video (marked as Petitioner's Exhibit 2 – a DVD). The Petitioner's exception seems to suggest that they believe the procedure for sending a copy of the DVD to the ALJ at DOAH resulted in its exclusion from evidence. However, the RO indicates that the exhibit was excluded from evidence because it "was not timely disclosed nor listed on the parties' Joint Prehearing Stipulation." (RO page 4). However, it was accepted as a proffer that would travel with the record. (RO page 6).

As noted above, evidentiary rulings are not matters over which I have substantive jurisdiction. See *Martuccio v. Dept. of Professional Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993). Such evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *Id.* In addition, the Petitioner failed to furnish me with a complete transcript of the DOAH hearing. Therefore, I cannot review the Petitioner's contentions regarding what instructions the ALJ may have given during the hearing concerning Petitioner's Exhibit 2. The Petitioner also states that the ALJ "refused to order a transcript" of the hearing. However, the case law has consistently held that the burden of furnishing a transcript is

on the party seeking review at the agency level. See, e.g., *Booker Creek Preservation, Inc. v. Dept. of Environmental Regulation*, 415 So.2d 750, 751 (Fla. 1st DCA 1982); see also *Rabren v. Dept. of Professional Regulation*, 568 So.2d 1283 (Fla. 1st DCA 1990); *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1st DCA 1987).

Therefore, the Petitioner's Exception No. 2 is denied.

Exception No. 3

The Petitioner takes exception to the fact that the ALJ failed to address or clarify the Petitioner's allegation that the Department attorney did not follow the ALJ's instructions to "assist petitioner in formatting a final recommendation." As previously noted, the Petitioner failed to furnish me with a complete transcript of the DOAH hearing. Therefore, I cannot review the Petitioner's contention regarding what instructions the ALJ may have given during the hearing. The case law has consistently held that the burden of furnishing a transcript is on the party seeking review at the agency level. See, e.g., *Booker Creek Preservation, Inc. v. Dept. of Environmental Regulation*, 415 So.2d 750, 751 (Fla. 1st DCA 1982); see also *Rabren v. Dept. of Professional Regulation*, 568 So.2d 1283 (Fla. 1st DCA 1990); *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1st DCA 1987). Therefore, the Petitioner's Exception No. 3 is denied.

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 ALJs by filing exceptions to 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). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Environmental Coalition of Florida, Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991). In addition, when a party files 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;" the reviewing agency need not rule on the exception. See § 120.57(1)(k), Fla. Stat. (2007).

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised, it is ORDERED that:

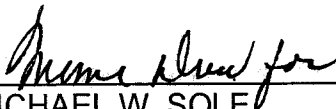
- A. The Recommended Order (Exhibit A) is adopted in its entirety and incorporated herein by reference.
- B. Respondent Carlson's project is exempt from the need to obtain an ERP permit under the criteria set forth in Section 403.813(2)(b)3., Florida Statutes, and Florida Administrative Code Rule 40E-4.051(3)(b)3.

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 Rules 9.110 and 9.190, 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 8 day of August, 2008, in Tallahassee, Florida.

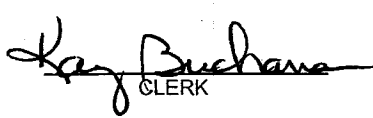
STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



MICHAEL W. SOLE
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 8/8/08
DATE

CERTIFICATE OF SERVICE

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

Frank E. Matthews, Esquire
Hopping Green & Sams, P.A.
Post Office Box 6526
Tallahassee, FL 32314-6526

Joseph Kowalski
Old Pelican Bay III Association, Inc.
12228 Siesta Drive
Fort Myers Beach, FL 33931-2328

Claudia Llado, Clerk and
Donald R. Alexander, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Ronald W. Hoenstine, III, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 8th day of August, 2008.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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