



SOUTH FLORIDA WATER MANAGEMENT DISTRICT

May 19, 2008

Claudia Llado, Clerk of the Division
State of Florida, Division of
Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

FILED
2008 MAY 22 A 11:12
DIVISION OF
ADMINISTRATIVE
HEARINGS

Dear Ms. Llado:

Subject: Pelican Bay Foundation, Inc. v. Collier County Water and Sewer District and South Florida Water Management District, DOAH Case No. 08-1063

Pursuant to subsection 120.57(1)(m), Florida Statutes, enclosed is a copy of the South Florida Water Management District's Final Order in the above referenced matter. The exceptions to the recommended order and responses to those exceptions filed by the parties are also enclosed.

If you have any questions, please call me at 561.682.6259.

Sincerely,

A handwritten signature in cursive script that reads "Joyce B. Rader".

Joyce B. Rader
Paralegal Specialist

JBR
Enclosures

BEFORE THE GOVERNING BOARD OF THE
SOUTH FLORIDA WATER MANAGEMENT DISTRICT

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SOUTH FLORIDA
WATER MANAGEMENT DISTRICT
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DIVISION OF
ADMINISTRATIVE
HEARINGS

PELICAN BAY FOUNDATION, INC.
Petitioner,

vs.

COLLIER COUNTY WATER AND SEWER
DISTRICT and SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Order No. 2008-215 FOF WU

DOAH Case No. 08-1063

Respondents.

FINAL ORDER

This matter was presented to the Governing Board of the South Florida Water Management District on May 15, 2008, for consideration of the Recommended Order of Dismissal (which is incorporated and attached as Exhibit A), issued by Administrative Law Judge ("ALJ") J. Lawrence Johnston on March 20, 2008.

Summary of the Proceedings

On January 8, 2008, SFWMD issued a renewal of Water Use Permit No. 11-00052-W to the Collier County Water and Sewer District. On January 10, 2008, Pelican Bay filed a Petition for Administrative Hearing. On January 18, 2008, SFWMD issued an Order Dismissing Petition With Leave To Amend (which is incorporated and attached as Exhibit B). On February 9, 2008, Pelican Bay filed an Amended Petition for Administrative Hearing ("Amended Petition," which is incorporated and attached as Exhibit C). On February 25, 2008, Collier County filed a Petition for Intervention. On February 27, 2008, Collier County filed a Motion to Dismiss Complaint, which SFWMD joined in all except one paragraph, and SFWMD issued an Order forwarding the Amended Petition and Motion to Dismiss to the Division of Administrative Hearings (DOAH). Collier County also filed a Motion for Official Recognition, which Petitioner

opposed, of the circuit court filings in *Pelican Bay Foundation, Inc., et al v. Collier County, et al*, Case No. 05-0371-CA,

On March 14, 2008, the ALJ held a telephonic hearing on the Motions to Dismiss and the Motion for Official Recognition filed by Collier County. On March 20, 2008, the ALJ issued a "Recommended Order Dismissal," which granted Collier County's Motion for Official Recognition and recommended that SFWMD dismiss the Amended Petition with prejudice. On April 3, 2008, Pelican Bay filed Exceptions to the "Recommended Order Dismissal," and on April 14, 2008, SFWMD and Collier County each filed Responses to Pelican Bay's Exceptions.

Standard of Review

Findings of Fact

Section 120.57(1)(l), Florida Statutes, provides that an agency reviewing a DOAH 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 or that the proceedings on which the findings were based did not comply with essential requirements of law." *Friends of Children v. Department of Health and Rehabilitative Services*, 504 So. 2d 1345, 1347-48 (Fla. 1st DCA 1987). An agency may not create or add to findings of fact because an agency is not the trier of fact. *Friends of Children v. Dep't of Health and Rehabilitative Services*, 504 So. 2d 1345 (Fla. 1st DCA 1987).

Conclusions of Law

Section 120.57(1)(l), Florida Statutes, provides that an agency may reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction" only when the agency's interpretation is "as or

more reasonable" than the interpretation made by the ALJ. See *Deep Lagoon Boat Club Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001). Florida Courts have consistently applied this section's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the ALJ's application of legal concepts such as collateral estoppel, *res judicata*, hearsay, but not from reviewing conclusions of law that are based upon the ALJ's application of an agency's administrative rules or procedures. *Id.* See also *Barfield v. Department of Health*, 805 So.2d 1008 (Fla. 1st DCA 2001). The "Legislature clearly intended to restrict agency review of legal conclusions in a recommended order to those that concern matters within the agency's field of expertise." *G.E.L. Corp. v. Department of Environmental Protection*, 875 So.2d 1257 (Fla. 5th DCA 2004). Based on Chapter 373, Florida Statutes, and Chapter 40E, Florida Administrative Code, the Governing Board has the administrative authority and substantive expertise to exercise regulatory jurisdiction over the administration and enforcement of water use permits.

RULING ON EXCEPTIONS

The Governing Board, having carefully considered each of the parties' Exceptions and the Responses thereto, makes the following rulings:

Response to Exception No. 1

Petitioner's first exception is that the Recommended Order fails to incorporate findings of fact to support the conclusions of law as required by Florida Administrative Code Rule 28-106.216(1). However, "[a] motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues, and the allegations of the complaint must be taken as true and all reasonable inferences therefrom construed in favor of the nonmoving party." *The Florida Bar v. Greene*, 926 So.2d 1195 (Fla. 2006). Thus, the ALJ made the conclusions of law based on the facts as plead in the Amended

Petition, evaluated in the light most favorable to Petitioner. *Id.* See also *Lutz Lake Fern Road Neighborhood Groups, Inc. v. Hillsborough County*, 779 So.2d 380 (Fla. 2d DCA 2000). The ALJ is not required to make findings of fact, because the facts stated in the Amended Petition are taken as true. For these reasons, Petitioner's first exception is REJECTED.

Response to Exception No. 2

Petitioner's second exception is to the ALJ's conclusion of law that Petitioner's "standing is based on alleged injury-in-fact that is not 'of sufficient immediacy.'" The basis for this exception is (i) it is not supported by findings of fact and (ii) "those reasons set forth in Petitioner's Response in Opposition to Collier County's Motion to Dismiss" (Response).

The first basis for the exception is identical to Exception No. 1 and is rejected for the same reasons.

The second basis is a merely general reference to the Response and does not provide any guidance or point to any specific reasons in support of Exception No 2. The ALJ reached the legal conclusion that Petitioner's do not have an "injury-in-fact of sufficient immediacy" to confer standing after considering "all the written and oral arguments" (Recommended Order Dismissal, page 2, paragraph 1), which included Petitioner's Response and all the reasons set forth in it. The ALJ's conclusion is reasonable and also consistent with prior interpretations and actions by SFWMD. None of the reasons set forth in Petitioner's Response provide any basis for an alternative conclusion that is "as or more reasonable" than the ALJ's. An agency may reject or modify an ALJ's conclusions of law only when the agency's interpretation is "as or more reasonable" than the interpretation made by the ALJ. See *Deep Lagoon Boat Club Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001). Therefore, SFWMD does not have

the authority to modify or reject this conclusion of law , and Exception No. 2 is REJECTED.

Response to Exception No. 3

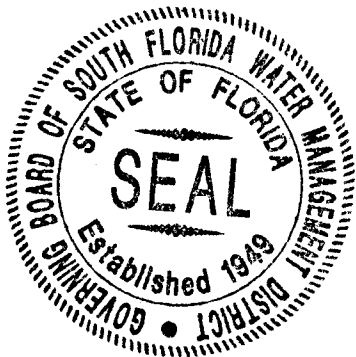
Petitioner's third exception is to the conclusion of law that "the alleged injury-in-fact is not 'of the type and nature intended to be protected' by the governing statutes and rules, in particular Section 373.250(2)(c), Florida Statutes." The basis for this Exception is (1) inclusion of Pelican Bay in the Collier County permit affects Petitioner's ability to obtain its own water use permit; (2) issuance of a separate water use permit for Pelican Bay creates the possibility of duplication of permitting and competition for limited water resources; and (3) the application of reclaimed water services to Pelican Bay keeps salt water intrusion into Florida aquifers at bay.

The ALJ reached the legal conclusion that Petitioner does not have an "injury-in-fact of sufficient immediacy" to confer standing after considering "all the written and oral arguments" (Recommended Order Dismissal, page 2, paragraph 1), which included Petitioner's Response and all the reasons set forth in it. The ALJ's conclusion is reasonable and also consistent with prior interpretations and actions by SFWMD. None of the reasons set forth in Petitioner's Response provide any basis for an alternative conclusion "as or more reasonable" than the ALJ's. An agency may reject or modify an ALJ's conclusions of law only when the agency's interpretation is "as or more reasonable" than the interpretation made by the ALJ. See *Deep Lagoon Boat Club Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001). Therefore, SFWMD does not have the authority to modify or reject this conclusion of law , and Exception No. 3 is REJECTED.

ORDER

Based upon the foregoing, the Governing Board, having considered the ALJ's Recommended Order of Dismissal, the Petitioner's exceptions and the responses thereto, and being otherwise fully advised in the premises, hereby (1) rejects Petitioner's exceptions; (2) adopts the Recommended Order of Dismissal in toto; (3) dismisses Petitioner's Amended Petition for Administrative Hearing filed February 8, 2008 with prejudice; and (4) issues Permit No. 11-00052-W as previously approved on January 8, 2008.

DONE AND SO ORDERED, this 15th day of May, 2008 in West Palm Beach, Florida.



SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,
BY ITS GOVERNING BOARD

Sheryl G. Wood

SHERYL G. WOOD, General Counsel

ATTEST:

BY: *Jackie McGorty*

DATE: 5/16/2008

LEGAL FORM APPROVED:

BY: *Sarah Hall*

DATE: 5/15/08

NOTICE OF RIGHTS

As required by Sections 120.569(1), and 120.60(3), Fla. Stat., following is notice of the opportunities which may be available for administrative hearing or judicial review when the substantial interests of a party are determined by an agency. Please note that this Notice of Rights is not intended to provide legal advice. Not all the legal proceedings detailed below may be an applicable or appropriate remedy. You may wish to consult an attorney regarding your legal rights.

RIGHT TO REQUEST ADMINISTRATIVE HEARING

A person whose substantial interests are or may be affected by the South Florida Water Management District's (SFWMD or District) action has the right to request an administrative hearing on that action pursuant to Sections 120.569 and 120.57, Fla. Stat. Persons seeking a hearing on a District decision which does or may determine their substantial interests shall file a petition for hearing with the District Clerk within 21 days of receipt of written notice of the decision, unless one of the following shorter time periods apply: 1) within 14 days of the notice of consolidated intent to grant or deny concurrently reviewed applications for environmental resource permits and use of sovereign submerged lands pursuant to Section 373.427, Fla. Stat.; or 2) within 14 days of service of an Administrative Order pursuant to Subsection 373.119(1), Fla. Stat. "Receipt of written notice of agency decision" means receipt of either written notice through mail, or electronic mail, or posting that the District has or intends to take final agency action, or publication of notice that the District has or intends to take final agency action. Any person who receives written notice of a SFWMD decision and fails to file a written request for hearing within the timeframe described above waives the right to request a hearing on that decision.

Filing Instructions

The Petition must be filed with the Office of the District Clerk of the SFWMD. Filings with the District Clerk may be made by mail, hand-delivery or facsimile. **Filings by e-mail will not be accepted.** Any person wishing to receive a clerked copy with the date and time stamped must provide an additional copy. A petition for administrative hearing is deemed filed upon receipt during normal business hours by the District Clerk at SFWMD headquarters in West Palm Beach, Florida. Any document received by the office of the SFWMD Clerk after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day. Additional filing instructions are as follows:

- Filings by mail must be addressed to the Office of the SFWMD Clerk, P.O. Box 24680, West Palm Beach, Florida 33416.
- Filings by hand-delivery must be delivered to the Office of the SFWMD Clerk. **Delivery of a petition to the SFWMD's security desk does not constitute filing. To ensure proper filing, it will be necessary to request the SFWMD's security officer to contact the Clerk's office.** An employee of the SFWMD's Clerk's office will receive and file the petition.
- Filings by facsimile must be transmitted to the SFWMD Clerk's Office at (561) 682-6010. Pursuant to Subsections 28-106.104(7), (8) and (9), Fla. Admin. Code, a party who files a document by facsimile represents that the original physically signed document will be retained by that party for the duration of that proceeding and of any subsequent appeal or subsequent proceeding in that cause. Any party who elects to file any document by facsimile shall be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document may not be properly filed with the clerk as a result. The filing date for a document filed by facsimile shall be the date the SFWMD Clerk receives the complete document.

Initiation of an Administrative Hearing

Pursuant to Rules 28-106.201 and 28-106.301, Fla. Admin. Code, initiation of an administrative hearing shall be made by written petition to the SFWMD in legible form and on 8 and 1/2 by 11 inch white paper. All petitions shall contain:

1. Identification of the action being contested, including the permit number, application number, District file number or any other SFWMD identification number, if known.
2. The name, address and telephone number of the petitioner and petitioner's representative, if any.
3. An explanation of how the petitioner's substantial interests will be affected by the agency determination.
4. A statement of when and how the petitioner received notice of the SFWMD's decision.
5. A statement of all disputed issues of material fact. If there are none, the petition must so indicate.
6. A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the SFWMD's proposed action.
7. A statement of the specific rules or statutes the petitioner contends require reversal or modification of the SFWMD's proposed action.
8. If disputed issues of material fact exist, the statement must also include an explanation of how the alleged facts relate to the specific rules or statutes.
9. A statement of the relief sought by the petitioner, stating precisely the action the petitioner wishes the SFWMD to take with respect to the SFWMD's proposed action.

A person may file a request for an extension of time for filing a petition. The SFWMD may, for good cause, grant the request. Requests for extension of time must be filed with the SFWMD prior to the deadline for filing a petition for hearing. Such requests for extension shall contain a certificate that the moving party has consulted with all other parties concerning the extension and that the SFWMD and any other parties agree to or oppose the extension. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

If the District's Governing Board takes action with substantially different impacts on water resources from the notice of intended agency decision, the persons who may be substantially affected shall have an additional point of entry pursuant to Rule 28-106.111, Fla. Admin. Code, unless otherwise provided by law.

Mediation

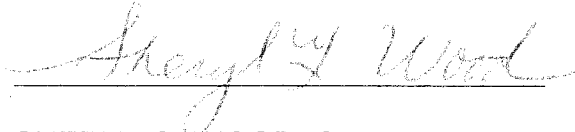
The procedures for pursuing mediation are set forth in Section 120.573, Fla. Stat., and Rules 28-106.111 and 28-106.401-.405, Fla. Admin. Code. The SFWMD is not proposing mediation for this agency action under Section 120.573, Fla. Stat., at this time.

RIGHT TO SEEK JUDICIAL REVIEW

Pursuant to Sections 120.60(3) and 120.68, Fla. Stat., a party who is adversely affected by final SFWMD action may seek judicial review of the SFWMD's final decision by filing a notice of appeal pursuant to Florida Rule of Appellate Procedure 9.110 in the Fourth District Court of Appeal or in the appellate district where a party resides and filing a second copy of the notice with the SFWMD Clerk within 30 days of rendering of the final SFWMD action.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been furnished
this 16th day of May, 2008, U.S. Mail to the following parties and counsel:



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