

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

JERRY POTTER,

Petitioner,

vs.

**OGC CASE NO. 08-2799
DOAH CASE NO. 09-0845**

**FRANK NEWITT and
STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,**

Respondents.

FINAL ORDER

On May 5, 2010, an administrative law judge (“ALJ”) with the Division of Administrative Hearings (“DOAH”) submitted his Order Closing File to the Department of Environmental Protection (“DEP” or “Department”), a copy of which is attached as Exhibit A. On May 12, 2010, the ALJ submitted his Order Relinquishing Jurisdiction, a copy of which is attached as Exhibit B.¹ The Order Closing File relinquished jurisdiction of the proceeding to the Department and indicated that copies were sent to counsel for DEP, co-respondent Frank Newitt (“Newitt”), and the Petitioner, Jerry Potter (“Potter”). Potter filed a Motion to Remand OGC Case 08-2799 on May 12, 2010, and DEP filed a response on May 19, 2010. The matter is now before me for entry of a final order.

¹ The ALJ’s May 12 order denied Potter’s Motion for Reconsideration of Order Closing File and reiterated that the May 5 Order Closing File relinquished jurisdiction to DEP for entry of a final order on Mr. Newitt’s withdrawn application. See Exhibit B.

BACKGROUND

On November 18, 2008, the Department notified Newitt that his application in File No. 44-0147198-005 to install a boatlift at an existing wood dock was exempt from the need for an Environmental Resource Permit ("ERP") under Section 40E-4.051(3)(a), Florida Administrative Code ("Notice"). The Department also determined that Newitt's project qualified for consent to use sovereign submerged lands. Potter timely filed a Petition for Formal Administrative Hearing ("Petition") challenging the Department's Notice. The Department forwarded the Petition to DOAH, and ALJ J. Lawrence Johnston was assigned to the case.

On May 4, 2010, Newitt filed his Notice of Withdrawal of Application, and on May 5, 2010, the ALJ entered an Order Closing File (Exhibit A). On the same day, the DEP filed and served by mail a Motion to Relinquish Jurisdiction. On May 7, 2010, Potter filed and served by fax to DOAH a Motion for Reconsideration of Order Closing File and a Response in opposition to DEP's Motion to Relinquish Jurisdiction. On May 12, 2010, Potter filed with the Department a Motion to Remand OGC Case 08-2799 to DOAH, in which he makes several arguments in support of his request to remand including his "pending Motion(s) with DOAH that will allow the ALJ to reconsider his Order closing case 09-0845 on May 5, 2010." However, on the same day, the ALJ entered an Order Relinquishing Jurisdiction (Exhibit B) that stated in pertinent part:

Petitioner's Motion for Reconsideration of Order Closing File is based on: Mr. Newitt's outstanding Motion for Attorney's Fees; Petitioner's desire to file a motion for fees (although Petitioner has not been represented by an attorney in this case); Petitioner's desire to complete discovery on Mr. Newitt's entitlement to a boat lift exemption (although the boat lift exemption application has been withdrawn);

Petitioner's desire to initiate and complete discovery on issues ruled irrelevant to Mr. Newitt's boat lift exemption application, including enforcement issues; and Petitioner's desire to have language used in recent orders clarified.

The Order Closing File in effect relinquished jurisdiction, returning it to DEP; and Petitioner's Motion for Reconsideration of Order Closing File must be denied for lack of jurisdiction.

In the event jurisdiction has not been relinquished to DEP already, Petitioner's Motion for Reconsideration of Order Closing File is denied on the merits, and jurisdiction is explicitly relinquished to DEP for entry of a final order on Mr. Newitt's withdrawn application.

RULING ON POTTER'S MOTION TO REMAND OGC CASE 08-2799 TO DOAH

Potter's motion to remand complains that the DOAH file was closed before he received written notice. He asks the Department to remand the case back to DOAH for the initial purpose of allowing the ALJ to rule on his motion for reconsideration. The Department declines Potter's request to remand the case for the following reasons.

On May 12, 2010, the ALJ denied Potter's motion for reconsideration for lack of jurisdiction because the May 5 Order Closing File "relinquished jurisdiction to DEP." However, Florida case law makes clear that when an applicant withdraws the permit application prior to the administrative hearing, the DOAH and the Department no longer have jurisdiction to proceed with the permitting process. *See, e.g., Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc.*, 630 So.2d 1123, 1128 (Fla. 2d DCA 1993)(concluding that agency jurisdiction is lost when the applicant withdraws its application prior to completion of the fact-finding process) *aff'd Wiregrass Ranch, Inc. v. Saddlebrook Resorts, Inc.*, 645 So.2d 374 (Fla. 1994). In *Saddlebrook* the District Court of Appeal explained that when a permit application is filed, the agency jurisdiction is

invoked and its permitting process is activated. *Saddlebrook*, 630 So.2d at 1125. The process of exercising jurisdiction is governed by Section 120.57, Florida Statutes, when the agency is determining the substantial interests of parties. *Id.* The *Saddlebrook* court noted that “[j]urisdiction and process are not synonymous.” *Id.* Therefore, jurisdiction to proceed to a conclusion of the permitting process is lost when the permit applicant withdraws its application. *Id.* at 1128. Both DOAH and the Department lost jurisdiction with regard to Newitt’s application on May 4, 2010, when it was withdrawn. Thus, the Section 120.57 process cannot proceed to a conclusion and Potter cannot seek to “place the case back before the ALJ,” for resolution of discovery issues or reconsideration of prior rulings. Since an administrative agency cannot confer jurisdiction upon itself, the Department’s file regarding Newitt’s application is closed for lack of jurisdiction to proceed further. See *Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc.*, 630 So.2d 1123, 1128 (Fla. 2d DCA 1993)(concluding that agency jurisdiction is lost when the applicant withdraws its application prior to completion of the fact-finding process) *aff’d Wiregrass Ranch, Inc. v. Saddlebrook Resorts, Inc.*, 645 So.2d 374 (Fla. 1994).

Therefore, for the foregoing reasons, Potter’s motion to remand to DOAH is declined.

Having considered the ALJ’s Order Closing File, Order Relinquishing Jurisdiction, and the applicable law, it is therefore ORDERED:

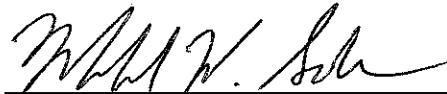
A. The Order Closing File (Exhibit A) and Order Relinquishing Jurisdiction (Exhibit B), as modified in my rulings above, are adopted in their entirety and incorporated herein by reference.

B. The Department's file (File No. 44-0147198-005) regarding Newitt's application for a boat lift exemption and consent of use is closed for lack of jurisdiction to proceed further.

Any party to this proceeding has the right to seek judicial review of this order under Section 120.68, Florida Statutes, by the filing of a notice of appeal under 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, Mail Station 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 thirty days after the date this order is filed with the clerk of the Department.

DONE AND ORDERED this 19th day of ~~May~~ June, 2010, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



MICHAEL W. SOLE
Secretary

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.

Kary Buchanan 6/22/10
CLERK DATE

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was mailed to:

Patricia Merle Silver
Silver Law Group
PO Box 710
Islamorada, Florida 33036-0710

Jerry Potter
29 North Bounty Lane
Key Largo, FL 33037

and provided electronically to:

Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Brynna Ross, Esq.,
Florida Dept. of Environmental Protection
Mail Station 35
3900 Commonwealth Blvd.
Tallahassee, FL 32399-3000

on this 22nd day of June, 2010.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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