Florida Department of Environmental Protection

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Charlie Crist
Governor

Jeff Kottkamp
Lt. Governor

Michael W. Sole
Secretary

April 14, 2010

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

Re: Thomas L. Sheehey vs. Michael Chbat and DEP
DOAH Case No.: 09-0948
DEP/OGC Case No.: 09-0027

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. Respondent Michael Chbat's Exceptions to the Recommended Order

If you have any questions, please do not hesitate to contact me at 245-2212 or lea.crandall@dep.state.fl.us.

Sincerely,

Lea Crandall

Lea Crandall
Agency Clerk

Attachments

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

THOMAS L. SHEEHEY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**OGC CASE NO. 09-0027**
	)	**DOAH CASE NO. 09-0948**
MICHAEL CHBAT and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
	)	
Respondents.	)	
	/	

FINAL ORDER

On January 14, 2010, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department") in the above-captioned proceeding. A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were sent to counsel for all the parties. On January 29, 2010, the Respondent, Michael Chbat ("Chbat"), filed Exceptions to the RO. No responses to the Exceptions were filed. This matter is now before me for final agency action.

BACKGROUND

Chbat and Petitioner Thomas Sheehey ("Sheehey") are neighbors in a bayfront subdivision known as LaGrange Bayou Estates, along Choctawhatchee Bay in Walton County. Their lots, both bayfront, are separated by a 50-foot drainage easement. On December 18, 2008, DEP issued Amended Wetland Resource Permit Number 66-

235320-002-DF (the "Amended Permit" or "WRP")[1] to Chbat, authorizing the construction of a culvert extension across his property; the presence of wetlands over which the Department has jurisdiction on Chbat's lot requires that he obtain a WRP before installing the culvert extension at issue.[2] Soon thereafter, Sheehey petitioned DEP for an administrative hearing, challenging the permit. Chbat filed a Motion to Dismiss Sheehey's petition, which was granted; Sheehey re-filed an amended petition on May 14, 2009, and the case ultimately went to hearing in September 2009.

In essence, the point of contention between the two parties concerns whether the proposed culvert extension will cause flooding on Sheehey's property. Across the street and to the north from Chbat's lot (Lot 9), Sheehey's lot (Lot 8), and the drainage easement, sits a 340-foot long pond which floods during heavy rains. Along the south end, or bayfront, of all three parcels sits a ridge, a naturally occurring "upland" that rises anywhere from one foot to two and a half feet above grade, preventing a substantial amount of runoff from exiting the properties to the bay. In other words, while the natural flow of water would be from north to south (Alden Lane to the bay), the ridge controls water in the southern portion of the lots, and often sends it flowing east or west.

The purpose of the drainage easement between the properties is to drain stormwater into the bay, facilitated by three culverts north of the easement. The westerly-most culvert, known as the "drainage ditch culvert," conveys stormwater from a ditch north of the properties down the western edge of the easement, through the ridge

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[1] In July 2008, Chbat filed an application, requesting the "extension of an existing pipe approximately 150 feet within a private lot." In December, the Department issued an "Amended Permit," authorizing the installation of a 177-foot pipe. While it's unclear why the Department issued the permit as an "Amended Permit," it appears related to the additional 27 feet of piping authorized in the permit, beyond the 150-foot extension requested. (T. Vol. 1, p. 57)

[2] The culvert extension was interchangeably referred to as a "pipe" or "culvert extension" throughout the proceedings below.

line and into the bay. The other two culverts, or the "pond culverts," catch overflow from the pond and convey it under and through Alden Lane toward the drainage easement. The easternmost pond culvert actually discharges onto the northwest corner Chbat's property, and is the subject of his permit application.

The proposed culvert extension is not Chbat's first attempt to manage the stormwater flow on his property. In 2004, he applied for a wetland resource permit to build a single family home and to relocate the easternmost culvert and add a pipe down the length of his property. Sheehey challenged this permit, claiming the planned culvert extension would direct water both onto the drainage easement and onto his property. Before going to hearing, the parties entered into a settlement agreement, under which Chbat agreed to amend his permit application and construct a drainage swale in lieu of the culvert extension; in exchange, Sheehey would not challenge the amended application. The amended permit authorizing construction of the swale issued in May 2007, and no challenges were filed.

Although Chbat built the swale as permitted, it did not function as planned; reasons include tidal flow from the Bay and problems maintaining the swale and keeping it clear of sand. Chbat then filed the subject permit application in July 2008, seeking authorization to replace the drainage swale with a culvert extension. Sheehey challenged this agency action on numerous grounds;[3] ultimately, the parties went to hearing to resolve the following issues: 1) whether Sheehey has standing to contest

[3] In his petition, Sheehey asked DEP to enforce the 2007 settlement agreement between Sheehey and Chbat, providing for construction of the swale. Prior to the hearing, DEP sought and was granted a motion in limine, preventing Sheehey from introducing evidence in support of the settlement agreement. The ALJ found that, although similar to the 2004 application resolved by the agreement, the 2008 permit application for the culvert extension is distinct and must be decided on its own merits without regard to the 2004 application, the proposed original permit, the settlement agreement or the final original permit authorizing construction of the swale. The settlement agreement was not excluded from the record or as evidence, however; it was allowed to be introduced as background.

approval of the 2008 Application; 2) whether Chbat gave notice required by section 373.413, Florida Statutes, and 3) whether Chbat's application meets the criteria in statutes and rules for issuance of a Wetland Resource Permit.

The final hearing was held on September 14 and 15, 2009, and the three volume transcript of the hearing was filed on October 26, 2009. All parties timely filed proposed recommended orders (PRO). The ALJ entered the RO on January 14, 2010.

RECOMMENDED ORDER

In the RO, the ALJ ultimately recommended denial of the Amended Permit for Mr. Chbat's failure to provide reasonable assurances that the project will not adversely affect Mr. Sheehey's property.[4]

The primary reason for the ALJ's finding centers on "the mound," or the mini-berm that will be created by the culvert extension and its sod cover, which will rise to an estimated seventeen to eighteen inches above grade along the length of Chbat's property. (RO Finding of Fact 57, 58). Because of this mini-berm, water on the west side of the culvert extension will no longer be able to flow easterward of the mound, and vice versa; therefore, the ALJ determined that, during heavy rain events, additional flooding of Sheehey's property is highly likely. (RO Finding of Fact 100)

The ALJ then explained that, pursuant to subsections 373.414(a) 1 – 7, Florida Statutes, the Department is required to consider and balance seven criteria when determining whether a proposed activity is not contrary to the public interest and

[4] At the hearing, the parties also addressed Sheehey's standing to challenge the permit issuance, whether Chbat gave proper notice under 373.414, Florida Statutes, and whether the proposed culvert extension would lead to water quality violations. In the RO, the ALJ concluded that Sheehey did have standing to bring the challenge, that the notice requirement in section 373.414, Florida Statutes, was not applicable, and that the project would not violate state water quality standards. (Conclusions of Law 102, 103, 113) No exceptions were filed on these issues, and I find no reason to disturb the ALJ's conclusions.

therefore qualifies for a Wetland Resource Permit. Of the seven, only one was particularly relevant to the instant dispute: whether the culvert extension will adversely affect the property of others. (Findings of Fact 94, 98) Based on the maintenance problems plaguing the drainage easement and the swale, the ALJ determined that, given the likelihood that Sheehey's property would experience additional flooding in heavy rains, Chbat had not provided reasonable assurances that the project would not have a detrimental effect on the property of others. (Findings of Fact 99, 100)

Based on these Findings of Fact, the ALJ concluded that Chbat had failed to show the project is not contrary to the public interest because of the effect the project is likely to have on Sheehey's property, due to the potential for the mounded culvert extension to impound water on Sheehey's lot that would otherwise move off-site. (Conclusions of Law 115, 119) Therefore, the ALJ recommended denial of the permit.

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

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." § 120.57(1)(l), Fla. Stat. (2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). 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 Comm'n*, 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., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.,* 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., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. 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 Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983). An agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." An agency's review of legal conclusions in a recommended order are restricted to those that concern matters within the agency's field of expertise. *See, e.g., G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). An agency has the primary responsibility of interpreting statutes and rules

within its regulatory jurisdiction and expertise. *See, e.g., Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

However, agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. 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 the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997). 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,* 622 So.2d at 609. Agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. *See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001).

Finally, 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. (2008). However, the agency 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.*

RULINGS ON EXCEPTIONS

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 ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So.2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So.2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. 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." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So.2d 540, 542 (Fla. 4th DCA 2003). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2009); *Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

Respondent Chbat's Exceptions to the Recommended Order

Exception No. 1 – Culvert Extension Above Grade

In Finding of Fact 58, the ALJ determined that the culvert extension "will be a mini-berm (or a 'mound') at an elevation of 17 to 18 inches above grade." (Finding of Fact 58) Chbat takes exception to this finding, and other findings and conclusions relying upon this determination,[5] arguing that there is no competent substantial evidence to support it; furthermore, Chbat argues that the permit application makes clear that the pipe and its sod cover (and any resulting mini-berm) will be located in the bottom of the existing swale, not on the land surface. The Department took no exception to this Finding and no Responses were filed.

I reject Chbat's exception. In essence, the Petitioner's exception consists of citations to record evidence conflicting with the ALJ's ultimate findings and conclusions and argues that the ALJ's Recommended Order is premised on a false assumption regarding the location of the proposed culvert extension. I cannot reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Rogers v.Dep't* of *Health,* 920 SO.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't* of *Envtl. Prot.,*695 SO.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd., 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.,Tedder v. Fla. Parole Comm'n,* 842 SO.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v.Dep't* of *Bus. Regulation,* 475 SO.2d 1277, 1281 (Fla. 1st DCA 1985). Moreover, there is competent substantial record evidence

[5] As Chbat explains in his Exceptions to the Recommended Order, "[a]ll of the Exceptions herein are intended to address the singular issue of whether there is competent, substantial evidence to support the Administrative Law Judge's finding that there will be a berm twelve to eighteen inches 'above grade.'" Specifically, Chbat takes exception to Findings of Fact 58, 63 – 70, 99, and 100, as well as Conclusions of Law 115, 116, and 119.

supporting Finding of Fact 58 and subsequent conclusions based upon that finding.[6] **Paragraphs 58, 63-70, 99, 100**: [T. Vol. 1 pp.43, 62, 91; T. Vol 2 pp. 23 - 24, 34 - 36, 38, 91, 107; T. Vol. 3 pp. 41, 43, 49, 62 - 66]. **Paragraphs 115, 116, 119:** [T. Vol 2 pp. 34, 108, 111 – 112, 115; T. Vol 3 pp. 46, 47, 49, 141].

Having no basis to disturb the ALJ's Findings of Fact that the culvert extension will create a mini-berm with the potential to flood Mr. Sheehey's property, I turn now to the Conclusions of Law based upon these findings. A determination of whether a permit applicant has provided reasonable assurance that a proposed project will not violate applicable environmental standards is not a purely factual matter, but involves a mixed question of fact and opinion. This ultimate determination of whether the requisite reasonable assurance has been provided by a permit applicant is a substantive matter which, in the final analysis, must be made by the Department, rather than by an administrative law judge. See, e.g., Miccosukee Tribe of Indians v. South Florida Water Management District, 20 FALR 4482, 4491 (Fla. DEP 1998), *affirmed*, 721 So.2d 389 (Fla. 3d DCA 1998); Save our Suwanee v. Piechocki, 18 FALR 1467, 1471 (Fla. DEP 1996); VQH Development, Inc. v. Dept of Environmental Protection, 15 FALR 3407, 3438 (Fla. DEP 1993); Barringer v. E. Speer and Associates, 14 FALR 3660, 3667 n.8 (Fla. DER 1992).

In the challenged portions of the Recommended Order, the ALJ quotes from applicable portions of the statutes and rules. The ALJ concludes that Chbat failed to

[6] Although Chbat disputes the ALJ's findings on the pipe's placement, the testimony of his own engineer, Mark Thomson, confirms that the pipe would, in fact, create a berm or mounding above grade. (T. Vol. 1, pps. 43-48) The testimony of the Department's environmental manager who reviewed the permit and recommended approval, and, the Department's stormwater engineer, also supports the finding that the culvert extension would create a berm above grade. (T. Vol. 2, pps. 24, 91, 107)

provide reasonable assurance that his proposed project will not adversely impact Mr. Sheehey's property, in violation of subsection 373.414(1)(a), Florida Statutes. For the reasons set forth above, I concur with the ALJ's Conclusions of Law 115, 116, and 119, asserting that Chbat has failed to provide reasonable assurance that his proposed culvert extension will not adversely impact Sheehey's property.

CONCLUSION

Pursuant to Rule 62-312.080(2),Florida Administrative Code, and subsection 373.414(1)(a), Florida Statutes, a permit applicant must provide the Department with reasonable assurance that the proposed project is not contrary to the public interest, which includes a consideration of whether the proposed activity will adversely affect the property of others. Based on the testimony put forth during the hearing regarding the proposed culvert extension's potential to flood his neighbor's lot, Chbat has failed to demonstrate entitlement to the Wetland Resource Permit.

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 therefore ORDERED:

A. The RO is adopted and incorporated by reference herein.

B. Respondent Chbat's permit No. 66-235320-002-DF for a Wetland Resource Permit is DENIED.

C. This Wetland Resource Permit denial is without prejudice to the filing by Chbat of a subsequent application proposing a culvert extension that complies with the applicable provisions of Rule 62-312, F.A.C.

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 13th day of April, 2010, 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.

Deputy CLERK 4-14-10 DATE

CERTIFICATE OF SERVICE

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

Frederick L. Aschauer, Jr., Esquire
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by electronic filing to:

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and by hand delivery to:

Amanda G. Bush, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 14th day of April, 2010.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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