



Florida Department of Environmental Protection

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Tallahassee, Florida 32399-3000

Charlie Crist
Governor

Jeff Kottkamp
Lt. Governor

Michael W. Sole
Secretary

June 25, 2010

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

Re: Wayne Zimmet vs. DEP & Richard Rosenblum
DOAH Case No.: 09-6596
DEP/OGC Case No.: 09-3837

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. Intervenor's Exceptions to the Recommended Order
3. DEP's Response to Intervenor's Exceptions to the Recommended Order
4. Zimmet's Response to Intervenor'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**

WAYNE ZIMMET,

Petitioner,

v.

DOAH CASE NO. 09-6596

OGC CASE NO. 09-3837

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondent,

and

RICHARD SCOTT ROSENBLUM,

Intervenor.

FINAL ORDER

On March 30, 2010, an administrative law judge (“ALJ”) from the Division of Administrative Hearings (“DOAH”) submitted his Order Cancelling Hearing, Closing File, and Relinquishing Jurisdiction (“Order Closing File”) to the Department of Environmental Protection (“Department”), a copy of which is attached as Exhibit A. The Order Closing File relinquished jurisdiction of the proceeding back to the Department and indicates that copies were served upon counsel for the Department, Petitioner Wayne Zimmet (“Zimmet”), and Intervenor, Richard Scott Rosenblum (“Rosenblum”). In response, Rosenblum, filed a Motion for Reconsideration with the ALJ, and on April 28, 2010, the ALJ issued an Order on Motion for Reconsideration affirming his earlier order (Exhibit B). Rosenblum filed an Exception to the Order, to which both the Department

and Zimmet filed responses, and Intervenor's Response to the Order for Reconsideration, Motion to Remand the Case to the DOAH, and Restated and Amended Letter of Exception. The matter is now before DEP for entry of a final order.

BACKGROUND

This is the second time this case has been before me, and both times it involved Zimmet's application for an exemption to build a marginal dock and boat lift on his property. The first application was filed on May 25, 2006, and was challenged by Rosenblum. In the first proceeding, there was an unresolved question regarding Rosenblum's right to moor a boat on the south side of his dock. Since the question of which party was entitled to moor a boat in that location was the subject of pending circuit court litigation, the administrative challenge moved forward under the assumption that Rosenblum had that right. Based on that assumption, the ALJ concluded that the Zimmet dock and boat lift would impede Rosenblum's rights to navigate a boat¹ from the south side of the dock. The Department adopted the Recommended Order in full and found that Zimmet was not entitled to the exemption. *Rosenblum, R. Scott vs. Dep't Envtl. Prot. & Wayne Zimmet*, F.A.L.R. (Fla. DEP 2007).

The circuit court litigation was concluded after the final order was entered, and Zimmet reapplied for the exemption in 2009. This time, the Department issued a notice of denial of the exemption based on the principle of *res judicata*. Zimmet petitioned for a hearing, and Rosenblum timely intervened. The case was referred to DOAH, but before the final hearing, both parties filed motions to relinquish jurisdiction, arguing there were no material facts in dispute. The ALJ reviewed the motions, considered the circuit court

¹ Rosenblum did own a boat at that time, but a typical size boat in the canal was approximately 24.5 feet in length and a beam of 8 to 8.5 feet. The ALJ used this sized boat in his navigation analysis.

Final Judgment (Exhibit C), and ruled that in fact Rosenblum's navigation rights would not be impaired by the dock and boat lift and recommended that Zimmet was entitled to the exemption. The facts and procedural history of the case are important to my ruling and are detailed below.

The Zimmet and Rosenblum Properties

Zimmet and Rosenblum are neighbors in the community of North Passage in Tequesta, Florida. They own adjoining properties at the end of North Canal, a dead end canal that was excavated from uplands. (Exhibit D) Rosenblum owns Lot 74 at the eastern end of the canal, and Zimmet owns Lot 75, which is the neighboring property to the south. Both lots extend into the open water of the canal and intersect a Boat Dockage Easement and a Navigational & Drainage Easement that runs down the center of the canal. Each property extends over open water in the canal before intersecting either easement. A dock ("5.5' Wood Walkway" on Exhibit D) extends west from Rosenblum's shoreline. The dock is entirely within Rosenblum's property boundary and does not intersect the dockage or navigation easements.

The Circuit Court Litigation

Zimmet sued Rosenblum to reform the dockage easement and a pedestrian easement to allow Zimmet to moor a boat on the south side of the dock. Rosenblum counterclaimed for a declaration that Zimmet had no right to use the south side of the dock. Thus, the seminal issue left for resolution in the administrative proceeding -- whether Rosenblum had the right to moor a boat on the south side of the dock -- was not squarely before the circuit court.

The circuit court litigation was concluded with a Final Judgment on December 8, 2008, in Case 06-1031-CA by the Circuit Court, 19th Judicial Circuit, in and for Martin County. Although the precise issue of whether Rosenblum had the right to moor a boat on the south side of the dock was not specifically raised in the circuit court action, the Final Judgment made three critical findings that inform the question. First, it ruled that Zimmet had no right to use the dock as it existed, because it did not extend into the common Drainage and Navigation Easement. Second, it ruled that if the dock was to be extended into that easement, then Zimmet would have right to use the south side of the extension.² Third, it ruled that the right to moor a vessel in the canal is governed by and limited to the dockage easement.

The Present Proceeding

On March 4, 2009, Zimmet again requested an exemption from the Department to build a marginal dock and boatlift in approximately the same dimensions and location as his original request. On April 29, 2009, the Department issued a letter in response indicating the Zimmet was exempt from the need to obtain a permit under Rule 40E-4.051(3)(a), Florida Administrative Code, but on August 6, 2009, Rosenblum filed a petition for administrative hearing challenging the Department's decision, rendering it proposed agency action. Upon consideration of the issues raised in the petition, the Department changed its position and issued a Notice of Denial of Exemption on September 28, 2009, claiming the doctrine of *res judicata* barred it from reversing its earlier denial. Although the dimensions of the proposed dock had changed, the Department determined that the impacts would be the same. Zimmet petitioned for a

² The dock extension was never built. From the pleadings, it appears that the homeowners' association denied permission to build the extension.

hearing on the denial and the case was referred to the Division of Administrative Hearings. Rosenblum subsequently moved to intervene, which motion was granted.

After the case was set for final hearing, Zimmet and Rosenblum filed separate motions to relinquish jurisdiction claiming that the circuit court final judgment resolved the last unresolved issue in the case: whether Rosenblum's right to navigation would be impeded. Both parties agree that the judgment prohibits Zimmet from using the south side of the dock, but Zimmet claims that the judgment also prohibits Rosenblum from using the south side since, the dock is not within the dockage easement, while Rosenblum disagrees with this interpretation.

The ALJ's Order Closing File

The ALJ found that the circuit court had in effect ruled that Rosenblum had no right to moor a boat on the south side of the dock, which meant that his right to navigate would not be impeded by Zimmet's dock and boatlift. This finding changed the basic assumption upon which the 2006 denial was based, and the ALJ recommended the exemption be approved. Although acknowledging that the Final Judgment does not explicitly prohibit Rosenblum from mooring a boat at the dock, the ALJ concluded there were two grounds for concluding Rosenblum had no such right.³ First, the circuit court found that the right to moor a vessel in the canal was governed by the dockage easement, and Rosenblum's dock did not extend into that easement. Thus, the ALJ concluded that neither party had the right to moor a boat at the dock, unless it was extended into the easement. Second, given the configuration of the dock and the common property boundary, even if Rosenblum had the right to moor a larger vessel on the south side of

³ The first ground is in the Order Closing File; the second ground is expressed in the Order on Motion for Reconsideration.

the dock, he could not navigate it from his property to the navigation easement without crossing his common boundary with Zimmet. Since the canal is excavated from uplands, the adjoining property owners have no riparian rights to the common use of the open water in the canal. *Publix Super Markets, Inc. v. Pearson*, 315 So. 2d 98 (Fla. 2nd DCA 1975). Under the principle established in *Anderson v. Bell*, 433 So. 2d 1202, 1207 (Fla. 1983) (“the owner of lands that lie contiguous to or beneath a portion of a man-made lake has no right to the beneficial use of the entire lake merely by virtue of the fact of ownership of the land”), the owner of privately owned submerged bottoms can exclude others from crossing over their property boundaries.

The parties were given an opportunity to file exceptions. On April 12, 2010, Rosenblum filed an exception to the Order Closing File, and Zimmet and the Department filed responses. On May 4, 2010, Rosenblum filed a Response to the ALJ’s Order for Reconsideration, Motion to Remand the Case to the DOAH ALJ, and Restated and Amended Letter of Exception. In this Final Order, I treat the Order Closing File and Order on Motion for Reconsideration together as a recommended order of dismissal, since the Order Closing File contains a factual finding concerning whether Zimmet’s dock and boatlift would impede Rosenblum’s ability to navigate a vessel from the south side of the dock.

RULING ON ROSENBLUM’S EXCEPTIONS

Rosenblum raises two exceptions to the Order Closing File: the ALJ’s conclusion that the Final Judgment held that “Rosenblum has no right to dock a boat on the south side” of the dock is an unjustified interpretation of the Final Judgment, and the doctrine of *res judicata* prevents the reconsideration of Zimmet’s application for an exemption.

Interpretation of the Final Judgment. As discussed above, the circuit court litigation did not directly confront the precise issue of Rosenblum's right to moor a boat on the south side of his dock, and Rosenblum correctly states that the Final Judgment does not specifically provide that he does not have the right to use the south side of the dock or that his rights to use the dock are limited by the easements. Nevertheless, the ALJ interpreted the judgment to that effect. The question before me is whether the ALJ had the authority to interpret the Final Judgment and conclude as he did. I believe he has that authority and that I am bound by his interpretation.

It is settled in Florida jurisprudence that the Department, and by extension an ALJ, has no authority to resolve real property disputes. *Buckley v. Dep't of Health and Rehab. Servs.*, 516 So. 2d 1008 (Fla. 1st DCA 1988). The circuit courts of this state have exclusive jurisdiction over "all actions involving titles or boundaries or right of possession of real property." See Art. V, Sec. 20(c)(3), Fla. Const.; Section 26.012(2)(g), Fla. Stat. Nevertheless, the Department is frequently required to interpret legal documents that concern real property interests, which it has the authority to do without impinging on the jurisdiction of the circuit courts. See e.g., *Board of Commissioners of Jupiter Inlet District, et al. v. Thibadeau and Dep't of Env'tl. Prot.*, (Fla. DEP 2005); *John Lay and Janet Lay v. Dep't of Env'tl Prot.* (Fla. DEP 2007). In this instance, the ALJ's interpretation of the judicial order did not determine Rosenblum's property interests; it simply interpreted a judicial decision that did.

I am bound by the ALJ's legal interpretation of the judgment. Regarding conclusions of law in a DOAH recommended order, Section 120.57(1)(1), Florida Statutes, provides that an agency may modify or reject those conclusions over which it

has "substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001). The related Florida case law holds that an agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See e.g., Public Employees Relations Comm. v. Dade County Police Benevolent Assn.*, 467 So.2d 987, 989 (Fla. 1985); *Florida Public Employees Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). The circuit court judgment is not within the Department's substantive jurisdiction, so I am unable to reject his interpretation, and the exception is therefore denied.

Res Judicata. The Department based its denial of Zimmet's second request for an exemption on the principle of *res judicata*, finding that the size and configuration of the dock and boatlift had not changed significantly, and the effects on navigation would be the same. The Department is not precluded from applying the doctrine of *res judicata* to deny a second application with minor modifications where the impacts of the project as a whole have not changed. *Thomson v. Florida Dep't of Envtl. Regulation*, 493 So. 2d 1032 (Fla. 1st DCA 1986). However, the ALJ rejected the application of *res judicata* finding that the Final Judgment had changed the fundamental assumption in the first denial. This new finding of fact -- that Rosenblum had no ability to navigate a boat from the south side of the dock -- derives directly from the ALJ's legal interpretation described above. I do not have authority to modify or reject conclusions of law that apply general legal concepts, such as *res judicata* and collateral estoppel. *Deep Lagoon Boat Club, Ltd. V. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2nd DCA 2001). Therefore, I deny this exception.

RULING ON ROSENBLUM'S MOTION TO REMAND THE CASE TO DOAH

Rosenblum asks me to remand the case back to the ALJ to “correct a clear error of law,” which he asserts is the ALJ’s interpretation of the Final Judgment. The ALJ invited such a remand if the Department determined his interpretation of the judgment was in error. However, given my ruling on Rosenblum’s exceptions, the Motion to Remand is Denied.

Having considered the ALJ’s Order Closing File, the exceptions filed by Rosenblum, and the applicable law, it is concluded that the factual findings, legal conclusions, and recommendations of the ALJ are correct. It is therefore ORDERED:

A. The Order Closing File is adopted in its entirety and is incorporated herein by reference.

B. The Application for Exemption, File No. 43-0190314 is approved.

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 25 day of June 2010, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Michael W. Sole
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.

Lea Crandall
CLERK

6/25/10
DATE

CERTIFICATE OF SERVICE

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

James D. Ryan, Esq.
Ryan & Ryan Attorneys, P.A.
631 U.S. Highway One, Ste. 100
North Palm Beach, FL 33408

Jacob E. Ensor, Esq.
Ross Earle & Bonan, P.A.
PO Box 2401
Stuart, FL 34994

and provided electronically to:

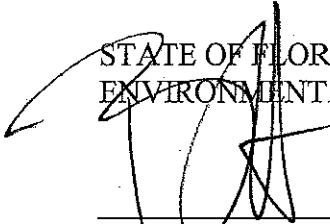
Division of Administrative Hearings
1230 Apalachee Parkway
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and by hand delivery to:

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

on this 25th day of June, 2010.

STATE OF FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION



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