

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,)	
)	
Petitioner,)	
)	
vs.)	DOAH CASE NO. 10-3000
)	OGC CASE NO. 10-1480
)	
EDITH PEPPER AND LYLE SPENCER,)	
)	
Respondents.)	
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FINAL ORDER

On March 4, 2011, 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. The RO, attached hereto as Exhibit A, indicates that copies were sent to counsel for the Petitioner DEP and to the Respondents Edith Pepper and Lyle Spencer. On May 5, 2011, the Department issued a Limited Remand Order (“LRO”) that is attached hereto as Exhibit B. On May 6, 2011, the ALJ submitted a Supplemental Recommended Order (“SRO”), attached hereto as Exhibit C, which shows that copies were sent to the parties. None of the parties filed any exceptions to the RO or to the SRO. The RO and SRO are now before the Secretary for final agency action.

BACKGROUND

On May 10, 2010, the Department issued a Final Order determining that the Respondent Edith Pepper had engaged in unauthorized construction seaward of the coastal construction control line ("CCCL"), that certain corrective action should be taken, and that she should pay a \$1,000.00 administrative fine. The Respondents Edith Pepper and Lyle Spencer are the owners of property located at 3100 Coastal Highway (also known as U.S. Highway A1A), in St. Augustine, Florida. On June 1, 2010, the Respondents Edith Pepper and Lyle Spencer, who own the subject property, filed a petition for administrative hearing in which they contested the Department's proposed action. The petition was forwarded by the Department to DOAH, assigned to an ALJ, who conducted an administrative hearing on January 28, 2011. There is no transcript of the hearing. Proposed findings of fact and conclusions of law were filed by the Department on February 24, 2011, and the ALJ subsequently issued the RO on March 4, 2011. On May 5, 2011, the Department issued a LRO, and on May 6, 2011, the ALJ submitted the SRO.

RECOMMENDED ORDER AND SUPPLEMENTAL RECOMMENDED ORDER

The ALJ ultimately recommended that the Department enter a final order requiring the Respondents to remove "the unauthorized wooden shore-normal retaining walls and concrete sidewalks from the area seaward of the CCCL and restore any areas disturbed during the removal process within 30 days" and "pay a \$1,000.00 administrative fine." (RO pages 15-16).

However, the ALJ concluded in paragraph 23 of the RO that the Department's burden of proof that the charges, corrective action, and proposed administrative fine should be sustained was "by a preponderance of the evidence." (RO ¶ 23). In response to the LRO the ALJ modified the conclusion in paragraph 23 of the RO to clarify that the Department's burden of proof was "by clear and convincing evidence." (SRO page 2). The ALJ concluded that the Department's burden was satisfied and that "the original recommendation is reaffirmed." (SRO page 2).

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 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." *Env'tl. 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. (2010);

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).

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO and SRO, and being otherwise duly advised,

It is therefore ORDERED:

A. The ALJ's Recommended Order (Exhibit A) as modified by the Supplemental Recommended Order (Exhibit C) is adopted and incorporated by reference herein.

B. Respondents shall remove the unauthorized wooden shore-normal retaining walls and concrete sidewalks from the area seaward of the CCCL and restore any areas disturbed during the removal process within 30 days after the date of this Final Order.

C. Respondents shall pay a \$1,000.00 administrative fine within 30 days after the date of this Final Order. The check shall be mailed to Administrative Enforcement Section, Ecosystem Management and Restoration Trust Fund, Attention: Jim Martinello, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000. The check should be payable to the "Ecosystem Management and Restoration Trust Fund" and include reference to file number VSJ 08-03 and OGC No. 10-1480.

JUDICIAL REVIEW

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 29th day of July, 2011, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


HERSCHEL T. VINYARD JR.
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.

 7/29/11
CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by

United States Postal Service to:

Lyle Spencer
100 Fairway Park Blvd.
Unit 1902
Ponte Vedra Beach, FL 32082-2625

Edith Pepper
3100 Coastal Highway
St. Augustine, FL 32084-2215

by electronic filing to:

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

and by hand delivery to:

Kirk S. White, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 27th day of July, 2011.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



FRANCINE M. FFOLKES
Administrative Law Counsel

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