

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY POTTER, )  
 )  
 )  
 Petitioner, )  
 vs. ) Case No. 10-9417  
 )  
 )  
 IRA ELLENTHAL, JUDITH )  
 ELLENTHAL, AND DEPARTMENT OF )  
 ENVIRONMENTAL PROTECTION, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

The single issue of whether Petitioner Potter timely filed his petition in this case was heard by Bram D.E. Canter, Administrative Law Judge, in a telephonic conference call on December 9, 2010.

APPEARANCES

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For Respondents Ira Ellenthal and Judith Ellenthal:

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For Respondent Department of Environmental Protection:

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STATEMENT OF THE ISSUE

Whether the Petition for Formal Administrative Hearing that initiated this proceeding was timely filed?

PRELIMINARY STATEMENT

On January 3, 2011, Administrative Law Judge Canter granted a motion for recusal filed by Petitioner Potter and the case was transferred to Administrative Law Judge David Maloney.

The parties were unable to reach an agreement on the filing of a transcript of the December 9, 2010, hearing. A status conference set for the case was cancelled after Petitioner filed an agreed-to motion for continuance of an evidentiary hearing set for March 25, 2011. Pursuant to status reports filed by the parties, who indicated their interest in pursuing settlement negotiations, the case was placed in abeyance on April 11, 2011.

On June 27, 2011, the Ellenthal Respondents filed a notice of the filing of the transcript of the December 9, 2010, hearing. An Order was entered that the parties should file their proposed recommended orders by the tenth day after receipt of the transcript. The Department and the Ellenthals timely

filed their individual proposed recommended orders on July 18, 2011.

On July 26, 2011, Mr. Geissinger filed a notice of appearance on behalf of Petitioner Potter. On August 1, 2011, an Order was issued that granted Petitioner Potter leave to file a proposed recommended order by August 10, 2011.

A Proposed Recommended Order filed by Petitioner bears a filing stamp of "[f]iled August 11, 2011 8:00 AM Division of Administrative Hearings." The certificate of service shows that it was served by U.S. Mail to the other parties on August 10, 2011. Petitioner's Proposed Recommended Order is deemed timely filed and has been reviewed and considered prior to the issuance of this Recommended Order.

#### FINDINGS OF FACT

1. On January 12, 2004, the Department of Environmental Protection issued a letter (the "Letter of Consent") to the Ellenthals that stated the following: "Ira & Judith Ellenthal are hereby authorized to proceed with the repair of approximately 674 sq. ft. of an existing dock and install two (2) boat lifts within the Bay of Florida." Department Ex. 7.

2. The Letter of Consent proclaimed that it constituted "sovereign lands authorization," id., and referenced:

Monroe County - ERP  
File No. 44-0223322-001  
Florida Keys Ecosystem Management Area.

Id. The Letter of Consent also shows the location of the activity it authorized as offshore of Lot 16, Block 6 of the Buccaneer Point Subdivision located on Bounty Lane in Key Largo.

3. Page 5 of the Letter of Consent provides to parties whose substantial interests are affected by the Department's action a notice of their rights, in pertinent part, as follows:

A person whose substantial interests are affected by the Department's action may petition for an administrative proceeding (hearing) under section 120.569 and 120.57 of the Florida Statutes.

\* \* \*

In accordance with rules 28-106.111(2) and 62-110.106(3) (a) (4), petitions for an administrative hearing must be filed within 21 days of publication of the notice or receipt of written notice, whichever occurs first. Under rule 62-110.106(4) of the Florida Administrative Code, a person whose substantial interests are affected by the Department's action may also request an extension of time to file a petition for an administrative hearing. The Department may for good cause shown, grant the request for an extension of time.

\* \* \*

A timely request for an extension of time shall toll the running of the time period for filing a petition until the request is acted upon. Upon motion by the requesting party showing that the failure to file a request for an extension of time before the deadline was the result of excusable

neglect, the Department may also grant the requested extension of time.

Id. at 5.

4. Prior to the issuance of the letter, Petitioner Potter had not requested that the Department give him notice of the Department's decision on the Ellenthal's application. Tr. 19.

5. Petitioner Potter's house is two houses to the south of the Ellenthal property. The distance between the Ellenthal dock and Mr. Potter's dock is between 130 and 131 feet by Mr. Potter's estimation. Mr. Potter sees the Ellenthal property on average "more than one time daily." Tr. 40.

6. Mr. Potter requested and was provided access to the file maintained by the Department on the Ellenthal property (the "Ellenthal File") on at least four separate occasions: January 25, 2009; April 30, 2009; April 9, 2010; and July 28, 2010.

7. The Letter of Consent should be present in the Ellenthal File in the normal course of business. The Department's witness, an administrative assistant, whose position requires her to maintain the Ellenthal File and who provided the file to him several times had no reason to believe that the file was not provided to him in its entirety every time he requested it. Documents that reflect agency action in 2004, like the Letter of Consent, remain in the agency file even when

the agency action is maintained in the Department's computer system.

8. Nonetheless, Mr. Potter maintains that he did not see the Letter of Consent on any of the times he reviewed the file until the last time, July 28, 2010, when there is no question in his mind that he received the "whole file," tr. 89, including the Letter of Consent.

9. Mr. Potter's purpose in reviewing the Ellenthal File was to obtain information about riparian lines that related to another case in which he was involved. He did not examine the file for any documents that related to anything other than the riparian lines issue.

10. Mr. Potter recalled that on January 25, 2009, there was only one page in the Ellenthal File and it was not the Letter of Consent. It was a document "from the State Bureau of Mapping and Surveying." Tr. 27-28. On the two times in the month of April in both 2009 and 2010 that he requested and reviewed the Ellenthal File looking for information about riparian lines, Mr. Potter was unable to recall what documents were in the file. On the April 9, 2010, visit to the Department's offices, Mr. Potter copied aerial photographs from the Ellenthal File. In answer to the question what other documents were in the file at that time, Mr. Potter responded:

I don't recall . . . I wasn't looking for anything other than . . . a photograph . . . overhead riparian line drawings. That's it. That's all I looked at. I wasn't looking at anything with words on it.

Tr. 88 (emphasis added).

11. On August 11, 2010, fourteen days after reviewing the file on July 28, 2011, Mr. Potter requested an extension of time to file a petition for an administrative hearing. The request was granted. The Order granting the extension allowed Mr. Potter to file a petition until September 27, 2010. But the order warned: "This Order does not constitute a determination that the request for an extension of time is timely or that a petition for an administrative hearing regarding Department File No. 44-0223322-001 filed on or before September 27, 2010, is or will be considered timely."

12. Mr. Potter filed the petition for formal administrative hearing on September 27, 2010, within the time allowed by the Department's order granting the extension of time for its filing. The Department filed a motion to bifurcate the hearing so that the single issue of whether the petition is timely or not could be considered separately from the merits of the petition. The motion was granted.

#### CONCLUSIONS OF LAW

13. Petitioner Potter has the burden of proving that his petition was timely filed since its timeliness has been

challenged by the Department and the Ellenthals. See Hasselback v. Dep't of Env'tl. Prot., Case No. 07-5216 (Fla. DOAH Jan. 28, 2010; Fla. DEP Mar. 12, 2010), rev. on other grounds, Hasselback v. Dep't of Env'tl. Prot., 54 So. 3d 637 (Fla. 1st DCA 2011).

14. Rule 62-110.106(3) (the "Department's Timeliness Rule") governs the time for filing a petition for an administrative proceeding to challenge a decision that determines substantial interests. With regard to proceedings that involve disputed issues of material fact and that do not involve an application for a permit under chapter 403 and related authorizations under section 373.427, such as this one, the Department's Timeliness Rule states:

Time for Filing Petition.

(a) A petition in the form required by Rule 28-106.201 . . . must be filed (received) in the office of General Counsel of the Department within the following number of days after receipt of notice of agency action, as defined in subsection (2) of this rule above:

\* \* \*

4. Petitions concerning . . . other Department actions . . . : twenty-one days.

15. "Receipt of Notice of Agency Action" is defined in the Department's Timeliness Rule as "receipt of written notice or publication of the notice in a newspaper of general circulation in the county . . . in which the activity is to take place,



whichever occurs first . . . ." Fla. Admin. Code R. 62-110.106(2).

16. The issue in this case, therefore, is whether Mr. Potter received "written notice" of the Letter of Consent when he was given the Ellenthal files to examine on the three occasions prior to July 28, 2010. If he received written notice on any of the three occasions, January 25, 2009; April 30, 2009; or April 9, 2010; then the time for filing the petition in this case expired long before he requested the extension of time to file his petition, and his petition is untimely.

17. Of the four times Mr. Potter is known to have reviewed the file, Mr. Potter recalled what was in the file twice. On January 25, 2009, he testified that he remembered only one document being in the file, which was not the Letter of Consent. On July 28, 2010, he testified that he received the entire file, including the Letter of Consent. On the other two occasions, Mr. Potter could not remember what was in the file other than any information he discovered with regard to riparian lines.

18. A determination of whether the Letter of Consent was in the file on any of the times that Mr. Potter examined the file prior to July 28, 2010, requires a balancing of conflicting evidence. The testimony of the Department's witness that the Letter of Consent would have been kept in the file at all times in the ordinary course of the Department's business, that there

was no reason to believe that the Letter of Consent was not in the file on any of the times it was provided to Mr. Potter, Mr. Potter's lack of memory as to what was in the file on April 30, 2009, and April 9, 2010, and the presence of the Letter of Consent in the file on August 28, 2010, outweigh whatever inference might be derived from Mr. Potter's memory that the Letter of Consent was not in the file on January 25, 2009. It is, therefore, concluded that the Letter of Consent was provided to Mr. Potter on April 30, 2009, and on April 9, 2010.

19. Mr. Potter emphatically testified that the first time he saw the Letter of Consent was when he examined the Ellenthal File on July 28, 2010. His testimony that he did not see it until July 28, 2010, is bolstered by his testimony that on the four occasions he was proven to have reviewed the Ellenthal File, he was examining the files for a specific purpose. That purpose did not require the reading of the file since it consisted of looking for aerial photographs or drawings of riparian lines in the neighborhood of Bounty Lane on Key Largo. It is concluded on the strength of Mr. Potter's testimony, therefore, that he did not read the words in the Letter of Consent, whether or not he might have casually observed the document while paging through the Ellenthal File and, therefore,

did not realize that a letter of consent was in the Ellenthal File.

20. The issue remains whether Mr. Potter may be charged with receipt of written notice of the Letter of Consent when he did not read it during the occasions that the Ellenthal File, including the Letter of Consent, was in his hands.

21. The Ellenthals cite to cases that refer to constructive notice and two types of actual notice: (1) express and (2) implied. In Department of Labor & Employment Security v. Little, 588 So. 2d 281 (Fla. 1st DCA 1991), set aside on other grounds, Little v. Department of Labor & Employment Security, 652 So. 2d 927 (Fla. 1st DCA 1995), the court wrote:

Notice is of two kinds: actual and constructive. Constructive notice has been defined as notice imputed to a person not having actual notice, for example: such as would be imputed under the recording statutes to persons dealing with property subject to those statutes. Actual notice is also said to be of two kinds: first, express, which includes what might be called direct information and second, implied, which is said to include notice inferred from the fact that the person had means of knowledge, which it was his duty to use and which he did not use, or as it is sometimes called, implied actual knowledge. Constructive notice is a legal inference, while implied notice is an inference of fact. . . . [emphasis added]

Dep't of Labor & Emp. Sec. v. Little, at 282 (quoting from First Fed. Sav. and Loan Ass'n of Miami v. Fisher, 60 So. 2d 496, 499 (Fla. 1952)).

22. The Department's Timeliness Rule refers to "receipt of written notice." It is concluded that Mr. Potter received written notice on April 30, 2009 (and on April 9, 2010, as well) with receipt of the Ellenthal File and that, as in cases of "implied actual notice," Mr. Potter was under a duty to examine the Ellenthal File to see if it contained evidence of agency action that might substantially affect his interests. Mr. Potter's duty to examine the file for written agency action that might affect his substantial interests flows from the location of the Ellenthal property in the vicinity of Mr. Potter's property, Mr. Potter's knowledge that the Ellenthals had a dock that served the Ellenthal property, and the very existence of a Department file that related to the Ellenthal property. In order to protect his interests that might be substantially affected by Department action with regard to the Ellenthal property, Mr. Potter, once he had been given the Ellenthal File, was obliged to examine the file for documents related to agency action. It is not excusable neglect that he did not read the file or the words in the file because his purpose was limited to ascertaining whether the file

contained drawings or aerial photographs related to riparian lines.

23. Mr. Potter's request for an extension of time to file a petition for administrative hearing was made long after the expiration of the twenty-one day period for filing such a petition.

24. Mr. Potter's petition, filed after the expiration of the time for filing a petition (or a request for an extension of time to file such a petition), was untimely. He waived, therefore, his right to an administrative hearing on the Letter of Consent. See Fla. Admin. Code R. 62-110.106(3)(b).

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department enter a Final Order that dismisses the Petition for Formal Administrative Hearing that initiated this case.

DONE AND ENTERED this 14th day of October, 2011 in  
Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
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this 14th day of October, 2011.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.