

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL AND CATHY LAROSA,

Petitioners,

vs.

Case No. 13-1853

PERRY FUNK AND DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.

RECOMMENDED ORDER OF DISMISSAL

This matter was heard on July 30, 2013, by video-teleconference at sites in Port St. Lucie and Tallahassee, Florida, before Bram D. E. Canter, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioners Michael and Cathy Larosa:

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For Respondent Perry Funk:

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For Respondent Department of Environmental Protection:

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STATEMENT OF THE ISSUE

The issue to be determined is whether Petitioners timely filed their petition for hearing to challenge the determination made by the Department of Environmental Protection ("Department") that Respondent Perry Funk's proposed dock project is exempt from the requirement to obtain an environmental resource permit.

PRELIMINARY STATEMENT

On March 21, 2013, the Department issued a letter to Respondent Funk informing him of its determination that the proposed modification of his private dock was exempt from the requirement to obtain an environmental resource permit.

On May 14, 2013, Petitioners filed a petition for hearing to challenge the Department's determination. The Department referred the petition to DOAH, but moved to dismiss the petition as untimely. Upon the unopposed motion of the Department, the proceeding was bifurcated to first address the issue of whether the petition was timely filed. At the hearing on the issue of timeliness, Petitioners presented the testimony of Michael LaRosa. Petitioners' Exhibits 1, 2, and 4 were admitted into evidence. The Department presented the testimony of

Benny Luedike. Respondents' Joint Exhibit 2 was admitted into evidence. No witness was called by Respondent Funk.

The one-volume Transcript of the hearing was filed with DOAH. The parties submitted proposed recommended orders which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioners and Respondent Funk reside on adjacent residential lots in St. Lucie County, Florida. They have adjacent private docks on a manmade basin off of Mud Cove, which connects to the St. Lucie River.

2. Sometime in January 2013, Michael LaRosa heard that Funk planned to make changes to his dock. When Funk was not forthcoming about his plans, LaRosa called the City of Port St. Lucie, the United States Army Corps of Engineers, and was finally directed to the Department.

3. On January 31, 2013, LaRosa had a telephone conversation with Benny Luedike, a Department employee in its West Palm Beach office. LaRosa asked what dock plans Funk had submitted to the Department. Luedike checked the Department's computer data base and informed LaRosa that Funk had not applied for a permit or other Department authorization to modify his dock. Luedike discussed with LaRosa the Department's general permitting procedures and the procedures for challenging any future action taken by the Department on Funk's dock.

4. There are two key disputed facts about what Luedike told LaRosa during their telephone conversation on January 31, 2013: 1) whether Luedike told LaRosa that the Department would notify LaRosa, either by regular mail or electronic mail, before the Department authorized any changes to Funk's dock, and 2) whether Luedike told LaRosa that LaRosa's "sign-off" would be necessary for Funk to make any changes to his dock. LaRosa says these representations were made to him by Luedike. Luedike says they were not.

5. Luedike is not in the Department's Port St. Lucie office, which is the office that is responsible for reviewing and taking agency action on proposed activities in St. Lucie County like Funk's proposed dock modification. Luedike is in the Department's West Palm Beach office. This fact supports Luedike's testimony that he provided general permitting information to LaRosa, and not information about what Luedike himself would do if Funk submitted a permit application or other information to the Department's Port St. Lucie office.

6. Luedike's testimony that he did not tell LaRosa that LaRosa would have to sign off on the Funk project is supported by the fact that no permit application or dock project plans had been submitted yet by Funk. Although the agreement of an adjacent riparian landowner is sometimes required when a proposed dock will encroach within an adjacent landowner's riparian lines,

as determined by the Department, Luedike had no project plans or information about riparian lines that would allow him to know or speculate about whether Funk's proposed project might encroach within LaRosa's riparian lines.

7. If the conversation on January 31, 2013, included a discussion of the Department rule that requires an adjacent riparian landowner's agreement to allow encroachment of riparian lines, it would account for how LaRosa got the idea that his sign-off was needed. Nevertheless, even assuming that this subject was discussed, Luedike had no basis to tell LaRosa that his sign-off would be required in this instance because Luedike and LaRosa did not know what Funk planned to do.

8. LaRosa may have come away from his conversation with Luedike believing that his sign-off was required for the Funk project, but LaRosa was mistaken. He misunderstood what Luedike told him.

9. Petitioners state in their proposed recommended order that "The undisputed testimony establishes that Mr. Luedike instructed Mr. LaRosa that he could wait until 'visually seeing' construction on the Funk property to call back for a copy of the permit at that time." Although Petitioners apparently make this statement to suggest that Luedike deprived Petitioners of the opportunity to challenge the permit, it is inconsistent with LaRosa's allegation that Luedike told him the Department would

notify LaRosa before action was taken on the Funk dock project and that LaRosa's sign-off would be necessary.

10. How this statement by Luedike fits within the context of his conversation with LaRosa is unknown. By itself, the statement is insufficient to show that Luedike made an affirmative statement to LaRosa that he could file a timely petition for hearing after construction began on the Funk dock.

11. Michael LaRosa had no contact with the Department or with Funk following his conversation with Luedike. Cathy LaRosa never had contact with the Department or Funk about the dock project.

12. On February 5, 2013, Funk filed an application with the Department, which was assigned file number 56-0137658-003.

13. Petitioners did not make a written request to be notified of the Funk dock project.

14. On March 21, 2013, the Department took the agency action that Petitioners seek to challenge, determining that Funk's proposed project was exempt from the need to obtain an environmental resource permit.

15. On March 28, 2013, Funk published notice of the Department's determination in the St. Lucie News-Tribune. The notice stated that persons whose substantial interests are affected by the Department's decision must file a petition for an administrative hearing in the Department's Office of General

Counsel within 21 days of publication of notice or receipt of notice, whichever occurs first.

16. Twenty-one days from the date of publication of the notice was April 18, 2013. No petition for hearing was received by the Department by this deadline and Funk began construction of his dock modifications. At the time of the hearing, Funk had installed a finger pier and four pilings.

17. Petitioners did not see the newspaper notice regarding the Funk dock project. Michael LaRosa saw construction activity at the Funk dock on May 13, 2013, and contacted the Department.

18. Petitioners filed their petition for hearing on May 14, 2013, one day after finding out the Department had taken action on the Funk project, but 26 days after the deadline stated in the newspaper notice.

CONCLUSIONS OF LAW

19. Florida Administrative Code Rule 62-110.106(3) states that persons whose substantial interests are affected by a Department decision and want to challenge the decision must file a petition for hearing with the Department within 21 days of publication of notice or receipt of notice, whichever occurs first.

20. The only persons entitled to personal notice by mail are each applicant, each party's attorney of record, and each

person who has made a written request for notice of agency action. See § 120.60(3), Fla. Stat. (2013).

21. Because Petitioners did not file their petition for hearing within 21 days of the newspaper notice, they waived their right to an administrative hearing unless they can prove circumstances that entitle them to an "equitable tolling" of the time period for filing their petition.

22. The doctrine of equitable tolling "[g]enerally has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Machules v. Dep't of Admin., 523 So. 2d 1132, 1134 (Fla. 1988).

23. Petitioners have the burden to prove by a preponderance of evidence the facts entitling them to application of the doctrine of equitable tolling.

24. Respondents advance several arguments about why Petitioners failed to meet certain factors associated with the doctrine discussed by the courts, such as the extent of prejudice that would occur if the doctrine were applied. The cases applying the doctrine of equitable tolling have not dealt with the same facts as are involved here. A resolution of some of the issues raised by Respondents is unnecessary to the determination made herein and, therefore, in the interest of judicial

restraint, no conclusions are made about how the courts should resolve those issues.

25. Petitioners' argument for application of the doctrine of equitable tolling in this case focuses on their claim that they were misled or lulled into inaction by Luedike's statements to LaRosa during their conversation on January 31, 2013. As found above, the Department did not mislead or lull Petitioners into inaction. The untimely filing was due to LaRosa's misunderstanding of what he was told by Luedike.

26. Petitioners failed to prove facts necessary to establish their right to equitable tolling. Their petition was untimely.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Environmental Protection enter a Final Order dismissing the Petitioners' petition for administrative hearing.

DONE AND ENTERED this 12th day of September, 2013, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of September, 2013.

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 of Dismissal. Any exceptions to this Recommended Order of Dismissal should be filed with the agency that will issue the Final Order in this case.