

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM B. SWAIM,)
)
 Petitioner,)
)
 vs.) Case No. 15-0091RU
)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondent.)
 _____ /

FINAL ORDER OF DISMISSAL

This cause is before the undersigned on Respondent's Motion to Dismiss (Motion) filed on January 21, 2015. The Motion seeks to dismiss Mr. Swaim's Petition to Determine Invalidity of Agency Rule and Agency Statement (Petition) on several grounds.^{1/} On January 22, 2015, Petitioner filed a response in opposition to the Motion. As explained below, the statement being challenged will not cause Mr. Swaim to suffer an immediate injury in fact, and on its face the statement is not a rule. For these reasons, the Motion is granted.

In brief, the Petition alleges that Mr. Swaim is a contract purchaser of certain property in Palm Beach County; that he applied for "an exemption/permit" from the South Florida Water Management District (SFWMD) and the U.S. Army Corps of Engineers;^{2/} and during that process, he requested that the Department of Environmental Protection (Department) make a "determination of State ownership of the Petitioner's property . . . for permitting and exemption purposes." Petition, ¶¶ 1 and 2. In response to that inquiry, on March 25, 2014, the Department's Chief of the Bureau of Survey and Mapping, Rod A. Maddox, advised Petitioner by letter as follows:

Our records contain insufficient information to determine ownership of the Spanish River prior to alterations at the subject site. Therefore, we recommend the proprietary requirements that would normally apply to state owned lands not apply to this site.

Sometime after December 16, 2014, in a telephone conversation with Mr. Maddox, Petitioner was told that the agency would not modify or clarify the letter. Petition, ¶ 1; Ex. A. The remainder of the Petition is largely argument that the Department's statement is incorrect and that there are no sovereign lands on the property subject to state ownership. As relief, the Petition requests the entry of a final order (a) determining that the challenged statement is an unadopted rule, and (b) ordering "DEP to issue a letter to the Petitioner that clearly state [sic] that the State of Florida has no ownership interest in the Petitioner's property."

In order to establish standing, Mr. Swaim must show that he will suffer a real or immediate injury in fact. The injury may not be based on speculation or conjecture. Here, the Department has indicated that it lacks sufficient information to make a definitive determination on the question presented. It leaves open the possibility of Mr. Swaim providing further information on this issue at a future time, which might lead to a different determination being made. Thus, at this time, the alleged "injury" is based on nothing more than speculation and conjecture.

An unadopted rule is defined in section 120.52(20), Florida Statutes, to mean "an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of s. 120.54." A rule means "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." § 120.52(16), Fla. Stat.

Even assuming that Mr. Swaim's substantial interests are affected by the letter, a statement which is limited to a particular person or singular factual situation on an ad hoc, case-by-case basis is not a statement of general applicability. See, e.g., State, Dep't of Com., Div. of Labor v. Matthews Corp., 358 So. 2d 256, 257 (Fla. 1st DCA 1978) (wage rate guidelines applicable only to the construction of a particular public building was not a statement of general applicability); Dep't of High. Safety & Motor Veh. v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997) (agency statements that applied only under "certain circumstances" and did not have the "consistent effect of law" were not statements of general applicability). In this case, the letter contains a narrowly focused, individualized

statement that agencies routinely issue in determining the substantial interests of individual persons. It is not a rule.

Because the deficiencies cannot be cured by an amended pleading, the Motion is granted, and the Petition is dismissed, with prejudice.

DONE AND ORDERED this 27th day of January, 2015, in Tallahassee, Leon County, Florida.

D. R. Alexander

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of January, 2015.

ENDNOTES

^{1/} Although styled as a challenge to an agency rule and agency statement, the Petition only challenges an agency statement. No existing rule is mentioned in the Petition.

^{2/} It appears that the SFWMD exemption case has been docketed as Case No. 14-0448 and is scheduled to be heard on March 18 and 19, 2015.

COPIES FURNISHED:

Ken Plante, Coordinator
Joint Administrative Procedures Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1400
(eServed)

Liz Cloud, Program Administrator
Administrative Code
Department of State
R. A. Gray Building, Suite 101
Tallahassee, Florida 32399
(eServed)

William B. Swaim
Apartment 104
600 Via Lugano Circle
Boynton Beach, Florida 33436
(eServed)

Benjamin M. Melnick, Esquire
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000
(eServed)

NOTICE OF RIGHT TO JUDICIAL REVIEW

A person who is adversely affected by this Final Order of Dismissal is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal in the First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.