

**STATE OF FLORIDA
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES**

PAUL AND KATHLEEN STILL,

Petitioners,

DOAH Case No.: 15-5750

vs.

AGENCY CLERK NO.: A92714

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES,

Respondent.

FINAL ORDER

THIS CAUSE arising under the section 373.407, Florida Statutes,¹ came before the Commissioner of the Florida Department of Agriculture and Consumer Services (“the Department”) for consideration and final agency action. The Commissioner of Agriculture and Consumer Services, as head of the Department, has jurisdiction over the subject matter and the parties.

I. STATEMENT OF THE ISSUE

The issue in this case is: Whether the Petitioners’ installation of ditch plugs on their property qualifies for an agricultural exemption from the requirement to obtain an environmental resource permit pursuant to section 373.406(2), Florida Statutes. The Recommended Final Order rendered February 2, 2016 by Administrative Law Judge E. Gary Early (“ALJ”) of the Division of Administrative Hearings (“DOAH”), found that the installation of ditch plugs was not exempt from permitting because the activity was not a normal and customary practice of silviculture in the area where the ditch plug were located or in the surrounding areas. That Recommended

¹ Unless otherwise noted, citations to statutes and rules are to their current, 2015, versions.

Order is now before the Commissioner of Agriculture and Consumer Services for final agency action.

II. PRELIMINARY STATEMENT

The Preliminary Statement in the Recommended Order states as follows²:

On September 14, 2015, Respondent, the Department, issued an Amended Binding Determination to Petitioners, Paul and Kathleen Still (“Petitioners”). The Binding Determination found that Petitioners’ construction of ditch plugs in existing drainage ditches was not a normal and customary practice for silviculture being conducted in the area, and therefore did not meet the standards for an agricultural exemption under section 373.406(2).

Petitioners timely filed a request for an administrative hearing which was referred to DOAH. The final hearing was thereafter noticed to commence on December 7, 2015.

On December 2, 2015, a Joint Stipulation of Parties was filed. The stipulated facts have been used in the preparation of the Recommended Order, either verbatim or with changes for style or continuity.

The final hearing commenced as scheduled on December 7, 2015, and was completed on that date. Although the hearing was originally scheduled as a video teleconference in Tallahassee and Gainesville, Florida, the parties and their witnesses agreed to appear in Tallahassee.

At the hearing, and at the request of the ALJ, the order of presentation was altered so that the Department presented witnesses and exhibits first, followed by Petitioners.

The Department called as witnesses: Patrick Webster, the senior professional engineer for the Suwannee River Water Management District; Jeffrey Vowell, assistant director for the Department’s Division of Forestry, Florida Forest Service; Bill Bartnick, a Department environmental analyst; and Andy Lamborn, who was at all times relevant hereto, the county forester for Bradford County and Baker County. Department Exhibits 1 through 4 were received in evidence. Exhibit 1 included subparts (a) through (i), and Exhibit 3 included subparts (a) through (d). As such, the Department introduced 17 individual exhibits, which were pre-tabbed in the Department’s exhibit binder as tabs 4 through 20.

Petitioner, Paul Still, testified on his own behalf, and recalled Mr. Webster; Mr. Bartnick; and Mr. Vowell as witnesses. Petitioners’ Exhibits 1, 2, 4-7, 9, 10, 18, 20, 21, 23, and 24 were received in evidence.

² The Preliminary Statement was excerpted directly from the Recommended Order; however, the acronyms have been modified for consistency.

A two-volume transcript was filed on December 28, 2015. By agreement of the parties, proposed Recommended Orders were due on January 11, 2016; were timely filed by both parties; and have been considered in the preparation of this Recommended Order.

III. POST HEARING PROCEDURAL HISTORY

The ALJ entered the Recommended Order on February 2, 2016. On February 15, 2016, the Department filed one exception to the Recommended Order. Petitioners filed none. The record consists of all notices, pleadings, motions, intermediate rulings, evidence admitted and matters officially recognized, the transcript of the proceedings, proposed findings and exceptions, stipulations of the parties and the Recommended Order.

IV. STANDARD OF REVIEW

Section 120.57(1)(l), Florida Statutes, dictates the applicable standard regarding “findings of fact.” The Department is therefore bound to accept the ALJ’s findings of fact unless, after a thorough review of the record, there exists no competent substantial evidence to support the finding. Id. See also Charlotte Cnty. v. IMC Phosphates Co., 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009); Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). Additionally, the Department cannot modify or substitute new Findings of Fact if competent substantial evidence supports the ALJ’s findings. Walker v. Bd. of Prof’l Eng’rs, 946 So. 2d 604, 605 (Fla. 1st DCA 2006); Gross v. Dep’t of Health, 819 So. 2d 997, 1004 (Fla. 5th DCA 2002).

Findings of fact that are actually Conclusions of Law should be treated as Conclusions of Law despite any mislabeling. Battaglia Props. Ltd. v. Fla. Land and Water Adjudicatory Comm’n, 629 So. 2d 161, 168 (Fla. 5th DCA 1993); Kinney v. Dep’t of State, 501 So. 2d 129, 132 (Fla. 5th DCA 1987). Unlike Findings of Fact, Conclusions of Law may be modified or

rejected by the Department and differing interpretation applied. Barfield v. Dep't of Health, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001); IMC Phosphates, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009). In this case, the Department must state with particularity its reasons for rejecting or modifying such conclusion of law and must make a finding that its substituted conclusion of law is more reasonable than that which was rejected or modified. s. 120.51(1)(l), Fla. Stat. (2015).

V. EXCEPTIONS TO THE RECOMMENDED ORDER

The Department takes exception to the following conclusion of law set forth in paragraph 37 on page 16 of the Recommended Order:

Under the facts of this case, it is found that the predominant purpose for installation of the ditch plugs by Petitioners was for enhancing the production of cypress trees, and not for impeding or diverting the flow of surface waters or adversely impacting wetlands.

The Department contends that in the initial Binding Determination, it did not evaluate the use of the ditch plugs under the third criterion of the three-part test set forth in Rule 5M-15.005(1), F.A.C., thus the ALJ was without authority to rule on this issue. The Department further argues that any conclusion of law related to this issue is merely dicta and should be rejected.

The standard of review in a section 120.57(1) hearing is de novo. The ALJ's role is to provide, after reviewing all of the evidence presented at the hearing, a recommendation as to final agency action. Dep't of Trans v. J.W.C. Co., Inc. 396 So.2d 778 (Fla. 1st DCA 1981); Moore v. State, Dep't of Health and Rehabilitative Services, 569 So.2d 759 (Fla. 1st DCA 1992).

In the case at bar, the Department, in conducting its Binding Determination, did not evaluate the last criterion of the test outlined in Rule 5M-15.005(1), F.A.C. because Petitioners

had already failed to establish that their activity was a normal and customary practice of silviculture. Despite this, the ALJ, while confirming Petitioners' failure, also added in dicta his view that Petitioners satisfied the third and uncontested prong of the three-part test. Because the ALJ is generally within his authority to make a finding regarding each part of the test, and even though this finding is of no consequence and is dicta, the Department's exception is overruled.

VI. FINDINGS OF FACT

1. The Commissioner of Agriculture adopts the Findings of Fact set forth in the attached Recommended Order.

VII. CONCLUSIONS OF LAW

2. The Commissioner of Agriculture adopts the conclusions of law set forth in the attached Recommended Order.

ORDERED AND ADJUDGED:

That Petitioners' installation of ditch plugs on their property is not a normal and customary practice for silviculture being conducted in the region where the ditch plugs are located, and therefore, the Petitioners' activity does not meet the standard for an agricultural exemption under section 373.406 (2), Florida Statutes.

NOTICE OF RIGHT TO APPEAL

Any party to these proceedings adversely affected by this Final Order is entitled to seek judicial review of this Final Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Judicial review proceedings must be instituted by filing a Notice of Appeal with the Department's Agency Clerk, 407 South Calhoun Street, Suite 509,

Tallahassee, Florida, 32399-0800, within thirty (30) days of rendition of this order. A copy of the Notice of Appeal must be filed with the Clerk of the appropriate District Court of Appeal accompanied by any filing fees prescribed by law.

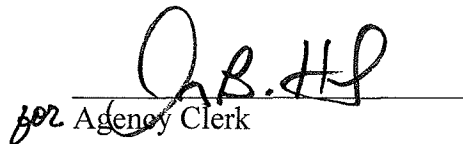
DONE AND ORDERED at Tallahassee, Leon County, Florida, this 27th day of April, 2016.

ADAM H. PUTNAM
COMMISSIONER OF AGRICULTURE



Michael A. Joyner
Assistant Commissioner of Agriculture

Filed with Agency Clerk this 27th day of April, 2016.



for Agency Clerk

Copies furnished to:

Petitioners, Paul and Kathleen Still
Respondent, Lorena Holley, General Counsel
Respondent, Lauren Brothers, Attorney