

BEFORE THE SUWANNEE RIVER WATER MANAGEMENT DISTRICT

PAUL STILL,

Petitioner,

vs.

SRWMD No. ERP-007-233697-2
DOAH CASE NO. 20-0091

SUWANNEE RIVER WATER
MANAGEMENT DISTRICT
and BRADFORD COUNTY,
FLORIDA,

Respondents.

_____ /

FINAL ORDER

On November 19, 2020, an administrative law judge (the "ALJ") with the Division of Administrative Hearings ("DOAH"), issued a Recommended Order (the "RO") to the Suwannee River Water Management District (the "DISTRICT") in this case. A copy of the RO is attached hereto as Exhibit "A." After review of the RO and the record of the proceeding before DOAH, this matter is now before the DISTRICT for final agency action.

BACKGROUND

On December 10, 2019, the DISTRICT entered a notice in Environmental Resource Permit (ERP): Exemption, ERP-007-233697-2 (the "EXEMPTION"), by which it determined that the Respondent, BRADFORD COUNTY, FLORIDA (the "COUNTY")'s activities related to the repair of Southwest 101st Avenue in Bradford County, Florida (the "ROAD") met the criteria to be an exempt activity pursuant to Rule 62-330.051(4)(e), Florida Administrative Code ("F.A.C.").

On or about December 23, 2019, Petitioner, Paul Still ("STILL") filed a Petition

Requesting an Administrative Hearing Review challenging the EXEMPTION, which was referred to DOAH and assigned DOAH Case No. 20-0091.

On September 10-11, 2020, a final hearing was held in this matter.

On November 19, 2020, the RO was issued.

No party has filed any exceptions to the RO and the time limit within which such exceptions may be filed has passed. Section 120.57(1)(k), Florida Statutes (“F.S.”); Rule 28-106.217(1), F.A.C.

SUMMARY OF RECOMMENDED ORDER

In the RO, the ALJ concluded that the modified burden of proof established in Section 120.569(2)(p), F.S., is applicable. (RO - page 4, paragraph 55, page 18).¹ The ALJ found that the COUNTY and DISTRICT had established a prima facie case of entitlement for the EXEMPTION (RO - page 4, paragraph 57, page 19). Therefore, the burden of ultimate persuasion was on STILL to prove his case in opposition to the EXEMPTION by a preponderance of the competent and substantial evidence and, thereby, prove that the COUNTY failed to provide reasonable assurance that the standards for issuance of the EXEMPTION were met. (RO - page 4, paragraph 58-59, page 19) The ALJ ultimately found that the COUNTY had provided reasonable assurance that it complied with all applicable standards for the EXEMPTION established by Rule 62-330.051(4)(e) and 62-330.050(9)(b), F.A.C., and that the COUNTY is entitled to the EXEMPTION (RO - paragraph 73, page 24).

¹Citations to the RO shall be by page number such that page 2 of the RO will be cited as “(RO - page 2)”. Where the paragraphs are numbered, citations to the RO shall be by paragraph and page number such that paragraph 3 of page 2 of the RO will be cited as “(RO - paragraph 3, 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, 81 (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 any findings of fact the parties “[have] thereby expressed [[their] agreement with, or at least waived any objection to, those findings of fact.” *Env'tl. Coal. of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. 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 and interpretations of administrative rules. Section 120.57(1)(l), F.S.

CORRECTIONS AND MODIFICATIONS TO THE RECOMMENDED ORDER

The DISTRICT agrees with the ALJ's legal conclusions and recommendations made in the RO. Therefore, the DISTRICT is not correcting or modifying the RO.

ATTORNEYS FEES AND COSTS

Under Florida Law:

The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.

Section 120.595(1)(b), F.S.

The requirements of Section 120.595(1)(b), F.S., have been met and an award of reasonable costs and a reasonable attorney's fee is warranted in this case because:

- A. This proceeding is a proceeding pursuant to Section 120.57(1), F.S. (RO - page 18, paragraph 54; page 19, paragraph 59)
- B. STILL has failed to substantially change the outcome of the proposed or final agency action which is the subject of this proceeding. Therefore, STILL is a "nonprevailing adverse party" as defined by Section 120.595(1)(e)3, F.S.
- C. The ALJ has determined that STILL participated in this proceeding for an improper purpose as set out below.

STILL PARTICIPATED IN THIS PROCEEDING FOR AN IMPROPER PURPOSE

An "improper purpose" is statutorily defined as follows:

"Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

Section 120.57(1)(e)1, F.S.

The ALJ determined that STILL participated in this proceeding for an improper purpose, when the ALJ expressly found:

82. Dr. Still admitted that 101st Avenue had not been altered in its course due to the exempt road repairs. (Tr. Vol. 2, 339:17-24). He did dispute whether the ROW had shifted from its original course in the years *before* the exempt road repair work.

83. Though he disputed ownership of the 101st Avenue ROW, Dr. Still admitted that he had no evidence that the County does not own the ROW. (Tr. Vol. 2, 352:25-353:10). He further admitted that he did not review section 95.361. (Tr. Vol. 2, 338:4-16).

84. Dr. Still's dispute as to the extent of the ROW seemingly should have been, and in fact was, resolved by his agreement to sell 1.78 acres of land to the County for the purpose of eliminating possible encroachment onto his property. That sale was commenced and completed as the work under the declared emergency was ongoing. There was no persuasive evidence to establish that the disputed 1.78 acres was actually outside of what was understood by the County to be the historic ROW, but its purchase definitively resolved the issue without the time and expense of litigation. It is difficult to craft an argument that the volitional sale of property to facilitate road repairs in an undisputed ROW, particularly when the travel surface of the road is unchanged, should then become a basis for denial of authorization to perform those road repairs.

85. Dr. Still appeared to have a concern with the initial replacement of an existing 30- inch culvert with two 24-inch culverts under 101st Avenue. Those 24-inch culverts appear in most of the photographs depicting the conditions in the area. However, when those culverts were then replaced (prior to the filing of the Petition) with one 30-inch culvert, matching the size of the preexisting culvert, any issues that existing water flow from the upgradient side of 101st Avenue was adversely impounded or obstructed, that the road repairs caused adverse impacts to existing surface water storage and conveyance capabilities, or that the road repairs caused adverse water quantity or flooding impacts to receiving waters and adjacent lands were eliminated. There was no evidence offered that the flow of water through the new 30-inch culvert was changed at all as a result of the completed road repairs. (Tr. Vol. 2, 308:18-21). Dr. Still provided no calculations of water flow or velocity to suggest that the road repairs will result in adverse water quantity or flooding impacts to receiving waters and adjacent lands.

86. The only conclusion that can be objectively drawn, given the facts of this case, is that the action challenging the Exemption was taken primarily to harass the County and the District, for frivolous purpose, or to needlessly increase the cost of securing the Exemption.

(RO at page 27-28) (Emphasis supplied)

Finally, the ALJ not only determined that STILL challenged the EXEMPTION for an improper purpose, but also determined that STILL's "improper purpose" applied to both the DISTRICT and the COUNTY (RO - page 28, paragraph 86). STILL did not file any exceptions to the this finding of fact. Therefore STILL has expressed his "agreement with, or at least waived any objection to" this finding of fact. *Env'tl. Coal. of Fla., Inc.*, at 1213. As the ALJ

expressly found that STILL's improper purpose applied to both the DISTRICT and the COUNTY, both the DISTRICT and the COUNTY are entitled to an award of reasonable costs and a reasonable attorney's fee pursuant to Section 120.595(1)(b), F.S.

AMOUNT OF AWARDS

The total amount of reasonable attorney's fees and costs to be awarded to the DISTRICT is \$30,000.00. The total amount of reasonable attorney's fees and costs to be awarded to the COUNTY is \$30,000.00.

ENFORCEMENT OF AWARD

Neither the COUNTY nor the DISTRICT will seek to enforce its award of attorney's fees and costs unless and until any one or more of the following occurs:

- A. STILL and/or Kathleen Still ("STILL'S SPOUSE") file a petition for administrative hearing, of any kind, with the DISTRICT, the St. Johns River Water Management District ("ST. JOHNS") the Florida Department of Environmental Protection ("FDEP") or DOAH.
- B. STILL and/or STILL'S SPOUSE appear as a party (petitioner, intervenor or otherwise) or amicus in an administrative proceeding, of any kind, in which the DISTRICT, ST. JOHNS, FDEP and/or the COUNTY is party. (STILL and/or STILL'S SPOUSE would not be deemed to "appear as a party (petitioner, intervenor or otherwise) or amicus in an administrative proceeding" where they appear as a witness in such proceeding, provided such appearance was in response to a lawfully issued subpoena.)
- C. STILL and/or STILL'S SPOUSE appear as a qualified representative in an administrative proceeding, of any kind, in which the DISTRICT, ST. JOHNS, FDEP and/or the

COUNTY is a party;

- D. STILL and/or STILL'S SPOUSE file a complaint or petition, of any kind, with any court or tribunal against the DISTRICT, ST. JOHNS, FDEP and/or the COUNTY; or,
- E. STILL and/or STILL'S SPOUSE participate as a party (plaintiff, petitioner, intervenor, or otherwise) or amicus in any proceeding, of any kind, before any court or tribunal in which the DISTRICT, ST. JOHNS, FDEP and/or the COUNTY is a party. (STILL and/or STILL'S SPOUSE would not be deemed to "participate as a party (plaintiff, petitioner, intervenor, or otherwise) or amicus in any proceeding" where they appear as a witness in such proceeding, provided such appearance was in response to a lawfully issued subpoena.)
- F. The use of the standing or membership of STILL and/or STILL'S SPOUSE to establish the associational standing of an association or group in an administrative or judicial proceeding, of any kind, in which the DISTRICT, ST. JOHNS, FDEP and/or the COUNTY is party.

(A though F above shall be referred to herein as the "TRIGGERING EVENTS")

ORDER

Having reviewed the RO and the record of the proceeding before DOAH, and having considered the applicable law and being otherwise duly advised, and upon the stipulation of all parties, it is ORDERED that:

- A. The RO is adopted in its entirety, and incorporated herein by reference, except that this case shall not be remanded to DOAH. As the parties have stipulated to the amount of the awards of attorneys fees and costs and the entry of this final

order, no remand to DOAH is necessary.


- B. The DISTRICT hereby approves the December 10, 2019, Environmental Resource Permit (ERP): Exemption, ERP-007-233697-2, determining that activities related to the repair of Southwest 101st Avenue in Bradford County, Florida, met the criteria to be an exempt activity pursuant to Rule 62-330.051(4)(e), F.A.C.;
- C. Pursuant to Section 120.595(1), F.S., the COUNTY is hereby provisionally awarded its reasonable costs and reasonable attorney's fees incurred in this proceeding (the "COUNTY AWARD") as a sanction against STILL. The stipulated amount of the COUNTY AWARD is \$30,000.00, plus interest at the legal rate from the date of this final order. Provided that STILL shall not be liable for, and the COUNTY shall not seek to enforce, the COUNTY AWARD unless and until one or more of the TRIGGERING EVENTS occurs within the next 20 years after the date of this final order. If any one or more of the TRIGGERING EVENTS occurs within the next 20 years after the date of this final order, then, within 30 days after written demand of the COUNTY, STILL shall pay the full amount of the COUNTY AWARD to the COUNTY. If none of the TRIGGERING EVENTS occurs within the next 20 years after the date of this final order, then STILL shall never be liable for nor required to pay the COUNTY AWARD. Should STILL be required to pay the COUNTY AWARD as provided herein and fail to do so in whole or in part, the COUNTY may seek to enforce payment of the full amount of the COUNTY AWARD pursuant to Section 120.569(k)2, F.S., and all other applicable provisions of law and in any such

enforcement action the prevailing party shall be entitled to recover its costs and reasonable attorneys fees incurred therein.

- D. Pursuant to Section 120.595(1), F.S., the DISTRICT is hereby provisionally awarded its reasonable costs and reasonable attorney's fees incurred in this proceeding (the "DISTRICT AWARD") as a sanction against STILL. The stipulated amount of the DISTRICT AWARD is \$30,000.00, plus interest at the legal rate from the date of this final order. Provided that STILL shall not be liable for, and the DISTRICT shall not seek to enforce, the DISTRICT AWARD unless and until one or more of the TRIGGERING EVENTS occurs within the next 20 years after the date of this final order. If any one or more of the TRIGGERING EVENTS occurs within the next 20 years after the date of this final order, then, within 30 days after written demand of the DISTRICT, STILL shall pay the full amount of the DISTRICT AWARD to the DISTRICT. If none of the TRIGGERING EVENTS occurs within the next 20 years after the date of this final order, then STILL shall never be liable for nor required to pay the DISTRICT AWARD. Should STILL be required to pay the DISTRICT AWARD as provided herein and fail to do so in whole or in part, the DISTRICT may seek to enforce payment of the full amount of the DISTRICT AWARD pursuant to Section 120.569(k)2, F.S., and all other applicable provisions of law and in any such enforcement action the prevailing party shall be entitled to recover its costs and reasonable attorneys fees incurred therein.

DONE and ORDERED on FEBRUARY 9, 2021.


GOVERNING BOARD OF THE SUWANNEE
RIVER WATER MANAGEMENT DISTRICT

By: 
Virginia H. Johns
Chair

ATTEST: 
Charles Keith
Secretary / Treasurer

CERTIFICATE OF FILING

I HEREBY CERTIFY that the above order was filed with the Suwannee River Water
Management District on FEBRUARY 9, 2021.


Warren Zwanka
Deputy Agency Clerk
Suwannee River Water Management District


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above order was provided to:

Paul Still
14167 SW 101st Ave
Starke, FL 32091
Email: stillpe@aol.com

William E. Sexton
14167 Southwest 101st Avenue
Starke, FL 32091
Email: will_sexton@bradfordcountyfl.gov

by email on FEBRUARY 10, 2021.


Warren Zwanka
Deputy Agency Clerk
Suwannee River Water Management District