

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

TRACY KOCHMANN,)
)
Petitioner,)

v.)

OGC CASE NO. 20-0153
DOAH CASE NO. 20-2993

KELLY ENDRES, IFRAIN LIMA AND)
DEPARTMENT OF ENVIORNMENTAL)
PROTECTION,)
)
Respondents.)

SHELLEY MEIER,)
)
Petitioner,)

v.)

OGC CASE NO. 20-0163
DOAH CASE NO. 20-2994

KELLY ENDRES, IFRAIN LIMA AND)
DEPARTMENT OF ENVIORNMENTAL)
PROTECTION,)
)
Respondents.)

BRIAN HACKER,)
)
Petitioner,)

v.)

OGC CASE NO. 20-0128
DOAH CASE NO. 20-2995

KELLY ENDRES, IFRAIN LIMA AND)
DEPARTMENT OF ENVIORNMENTAL)
PROTECTION,)
)
Respondents.)

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on December 1, 2020, submitted a Recommended Order (RO) to the Department of

Environmental Protection (DEP or Department) in the above-captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. No party filed exceptions to the ALJ's RO. This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On April 12, 2018, the Respondents Kelly Endres (Endres) and Ifrain Lima (Lima) applied to the Department for an environmental resource permit (ERP) for construction of a single-family home within wetlands. The Department denied the ERP application on January 7, 2019.

On January 30, 2019, the Department issued a warning letter to the Respondents for the dredging and filling of approximately 0.80 acres of forested wetlands and improper installation of erosion and sedimentation control. On July 18, 2019, the Department and the Respondents executed a consent order (CO), which required Endres and Lima to cease any dredging, filling, or construction on their property, and submit an application for an environmental resource permit (ERP) for their single-family home.

On August 22, 2019, Endres and Lima submitted a second ERP application to construct their single-family home. On February 7, 2020, the Department issued a notice of intent to issue the ERP (NOI) for construction of the Respondents' single-family home with associated structures (Project), which was published in the *Sanford Herald* on February 9, 2020.

On May 26, 2020, Petitioner, Shelley Meier (Meier), timely filed a petition for hearing with the Department. On June 11, 2020, Petitioner, Brian Hacker (Hacker), and Petitioner, Tracy Kochmann (Kochmann), separately, timely filed petitions for hearing with the Department. On July 1, 2020, the Department referred the three petitions to DOAH. DOAH consolidated the petitions on July 7, 2020.

Respondents Endres and Lima filed a Motion to Strike Witness David Mahnken, and Petitioner Kochmann filed an objection to the motion on September 16, 2020. The Department filed a Motion in Limine also on September 16, 2020. On September 17, 2020, the Department's motion was granted, in part, as it related to matters concerning the City of Oviedo's enforcement action; and was denied as to the previous dredge and fill violation on the Property. The ALJ denied the Respondents Endres' and Lima's motion to strike at the final hearing.

A final hearing was held on September 17 and 18, 2020. At the final hearing, Respondents Endres and Lima presented the expert and fact testimonies of John Herbert, who was accepted as an expert in civil engineering, and Gary Exner, who was accepted as an expert in biology. The Department presented the fact testimony of Megan Warr, Environmental Specialist III, and Jason Seyfert, Environmental Manager. Petitioners presented the fact testimony of Nicholas Lenssen and Mr. Hacker, and the expert testimony of David Mahnken, an environmental scientist.

A three-volume transcript of the hearing was filed with DOAH on October 16, 2020. The parties timely filed their proposed recommended orders on November 6, 2020.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order granting an environmental resource permit to the Respondents Kelly Endress and Ifrain Lima for construction of a single-family residence and associated structures, a private dock with a walkway and a boat ramp, at 160 Long Acres Lane, Oviedo, Florida. (RO at pp. 3 and 16). In doing so, the ALJ concluded the Respondents provided reasonable assurances that the Project is not contrary to the public interest pursuant to section 373.414(1)(a), Florida Statutes. (RO ¶ 58).

Specifically, the ALJ concluded that the Respondents “proved that the Project will not adversely affect the public health, safety, and welfare; the conservation of fish or wildlife or their habitats; the navigation or flow of water in Long Lake; fishing or recreational value of Long Lake; or significant historical resources.” (RO ¶ 58). In addition, the ALJ found that “the current condition, and value of functions being performed by areas affected by the Project, will not be adversely affected,” because “the quality of the wetlands on the Property pre-clearing were of moderate condition and had been degraded due to other developments along Long Lake.” *Id.* Moreover, the ALJ concluded that the Petitioners failed to carry their burden of ultimate persuasion in opposition to the permit (RO ¶ 54), based on the ALJ’s mixed finding of fact and conclusion of law that they “failed to prove lack of reasonable assurance by a preponderance of the competent substantial evidence.” (RO ¶ 49).

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 (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.” *Envtl. 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 over which the

agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2020); *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *Fla. Public Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

No party filed any exceptions to the RO objecting to the ALJ's findings or recommendations or to the DOAH hearing procedures. The Department concurs with the ALJ's legal conclusions and recommendations.

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order (Exhibit A) is adopted and incorporated by reference herein; and

B. The environmental resource permit to Kelly Endres and Ifrain Lima to construct a single-family home and associated structures (a private dock with a walkway, and a boat ramp) is APPROVED, subject to the general and specific conditions set forth therein.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the

appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 12th day of January, 2021, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



NOAH VALENSTEIN
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Syndie Kinsey Digitally signed by Syndie Kinsey
Date: 2021.01.12 13:52:23 -05'00'

CLERK

DATE

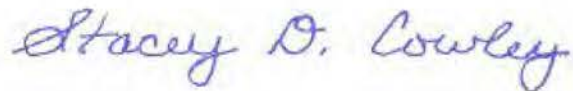
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by
electronic mail to:

Tracy L. Kochmann 249 Carolyn Drive Oviedo, Florida 32765 tracy@kochmann.us	Shelley Meier 208 Long Acres Lane Oviedo, Florida 32765 shelley_meier@bellsouth.net
Brian Hacker 170 Long Acres Lane Oviedo, Florida 32765 bhacker8@gmail.com	Neysa Borkert, Esquire Garganese, Weiss, D'Agresta and Salzman 111 North Orange Avenue, Suite 2000 Post Office Box 398 Orlando, Florida 32802 nborkert@orlandolaw.net
Jay Patrick Reynolds, Esquire Department of Environmental Protection 3900 Commonwealth Boulevard, MS 35 Tallahassee, Florida 32399-3000 Patrick.Reynolds@FloridaDEP.gov	

this 12th day of January, 2021.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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