

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DANIEL CARNEY, JAMES COLLIER, AND
KEVIN SPARKS,

Petitioners,

vs.

Case No. 23-1786

CITY OF CAPE CORAL AND STATE OF
FLORIDA DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

INTERLOCUTORY ORDER ON TIMELINESS OF PETITION

A duly-noticed hearing was held in this case on August 28 and September 25, 2023, in Tallahassee, Florida, and via Zoom teleconference, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings (the “Division”).

APPEARANCES

For Petitioners: J. Michael Hannon, Qualified Representative
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For Respondent Department of Environmental Protection:

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STATEMENT OF THE ISSUE

Whether the Petition for Administrative Hearing (“Petition”) filed by Petitioners in this case on April 19, 2023, was timely, pursuant to Florida Administrative Code Rule 62-110.106(3)(a)4.

PRELIMINARY STATEMENT

On April 19, 2023, Petitioners¹ filed the Petition challenging the issuance by the Department of Environmental Protection (“Department”) of Environmental Resource Permit 244816-006 (“the ERP”) issued to the City of Cape Coral (“City”). The Department forwarded the Petition to the Division on May 8, 2023. The City filed a Motion to Dismiss the Petition for Administrative Hearing, or Alternatively, Motion for Evidentiary Hearing on the Timeliness of the Petition (“Motion to Dismiss”), claiming the Petition was not timely filed because Petitioners’ prior request for extension was untimely. The undersigned denied the Motion to Dismiss, but granted the request for an evidentiary hearing on timeliness of the Petition.

¹ The Petition was originally filed by seven parties; however, all parties other than Mr. Carney, Mr. Collier, and Mr. Sparks, withdrew their Petitions on August 23, 2023. References herein to the Petitioners are to the three remaining Petitioners in this action.

At the evidentiary hearing, the City presented the testimony of Kevin Sparks, Daniel Carney, James Collier, John Cassani, and Michael Hannon. The Department presented no witnesses. Petitioners presented the testimony of Jason Pim, James Collier, and Michael Hannon. Joint Exhibits 1 through 17 were admitted in evidence. Respondents' Exhibits 6 through 8, 18, 37, and 38 were admitted in evidence, as well as pages 21, 26, 31, 32, 34 through 38, and 249 of Respondents' Exhibit 28. Petitioners' Exhibits 1 through 3 were admitted in evidence, and Petitioners proffered Exhibits 4a and 4b, 4d, 4f and 4g, 4h, 4o, and 4q.

The hearing was recorded and a two-volume Transcript of the hearing was filed on October 3, 2023. The parties timely filed Proposed Recommended Orders, which have been considered by the undersigned in preparation of this Interlocutory Order.

FINDINGS OF FACT

1. The Department is the state agency with the duty and authority to administer and enforce the provisions of chapter 373, Florida Statutes, and the implementing administrative rules.

2. On February 17, 2023, the Department issued the ERP and a Notice of Intent ("NOI") to Issue the ERP to the City. The Permit was issued pursuant to Part IV of chapter 373 and Florida Administrative Code Rule 62-330.

3. Petitioners filed their Petition challenging the ERP on April 19, 2023.

4. The evidence was insufficient to support a finding that any of the Petitioners received written notice of the NOI prior to filing the Petition. The evidence was not even sufficient to determine when each of the three Petitioners first "heard of," or otherwise became aware of, the NOI. The Petitioners' testimony was unclear, unreliable, and in some cases, contradicted by their deposition testimony.

5. The City published notice of the NOI in the Ft. Myers Free Press on March 3, 2023, as required by rule 62-110.106(7)(a)1.

6. The NOI contains the following required “clear point of entry” for persons to challenge the ERP:

Petitions ... must be filed within 21 days of publication of the public notice or within 21 days of their receipt of this intent, whichever occurs first. The failure of any person to file a petition within the appropriate time period shall constitute a waiver of that person’s right to request an administrative determination (hearing) under sections 120.569 and 120.57 of the Florida Statutes, or to intervene in this proceeding and participate as a party to it.

7. Since the City published the NOI on March 3, 2023, the 21-day period to file a petition based on the date of publication was March 24, 2023.

8. Rule 62-110.106(4) governs enlargement of time and authorizes the Department to grant an enlargement of time for taking any action under any department rule “if the request for such enlargement is made before the expiration of the period to be enlarged[.]”

9. On March 21, 2023, Mr. Hannon, purportedly on behalf of Petitioners, filed with the Department a request to enlarge the time until May 24, 2023, to file a petition challenging the ERP.

10. On March 28, 2023, over the objection of the City, the Department granted the enlargement of time as to Petitioners, setting a deadline of 21 days from the date of the order—April 19, 2023—for filing a petition.

11. Mr. Hannon filed the Petition with the Department on behalf of Petitioners on April 19, 2023.

12. The Department forwarded the Petition to the Division on May 8, 2023, for assignment of an Administrative Law Judge to conduct a hearing on the Petition.

13. On June 2, 2023, Petitioners filed a request with the Division to be represented by Mr. Hannon as their Qualified Representative, pursuant to Florida Administrative Code Rule 28-106.106(2)(a). The undersigned subsequently granted that request.

CONCLUSIONS OF LAW

14. The Division has jurisdiction of this matter, and the parties thereto, pursuant to sections 120.569 and 120.57, Florida Statutes (2022).

15. Respondents have the burden to prove that Petitioners waived their right to file a petition challenging the ERP based on the passage of time. *See Dep't of Env't Regul. v. Puckett Oil Co.*, 577 So. 2d 988, 993 (Fla. 1st DCA 1991) (“Waiver [however,] is not a concept favored in the law, and must be clearly demonstrated by the agency [or other party] claiming the benefit.”). (bracketed words in original).

16. The Department has adopted rule 62-110.106, which defines “Receipt of Notice of Agency Action” as “either receipt of written notice or publication of notice in a newspaper of general circulation ... whichever first occurs[.]”

17. Respondents did not prove that Petitioners ever received written notice of the NOI. By operation of the rule, Petitioners “received notice of the agency action” when it was published on March 24, 2023.²

² The City’s argument that Petitioners’ receipt of the NOI should be deemed the date their representative, Mr. Hannon, received written notice, was not persuasive. The cases relied upon by the City are distinguishable from the instant case—cases in which published notice was either not required or not provided, thus notice had to be determined with resort to principles of “actual notice,” whether express or implied. *See Accardi v. Dep't of Env't Prot.*, 824 So 2d 992 (Fla. 4th DCA 2002). *See also Cons. Alliance of St. Lucie Cnty. v. Ft. Pierce Util. Auth.*, Case No. 09-1588 (Fla. DOAH May 24, 2013; Fla. DEP July 8, 2013) (“When notice has not been published or provided by a means by which a date certain may be established, and the issue is the date upon which a substantially affected person received actual notice, the parties seeking to establish waiver based upon the passage of time ... must show that the party affected by such action has received sufficient notice to commence the running of the time period within which review must be sought.”). The City’s reliance on *City of LaBelle v. Bio-Med Services, Inc.*, 598 So. 2d 207, 209 (Fla. 2d DCA 1992), is also misplaced, because the petition in that case was dismissed as untimely when filed 14 days after publication of notice because petitioner had written notice via certified mail prior to published notice.

18. Petitioners' request for enlargement of time was timely made on March 21, 2023.

19. The City's remaining arguments supporting its contention that the Petition was untimely and invalid are also without merit.

20. The City maintains that Mr. Hannon's request for enlargement of time was invalid as to Petitioners because he had not filed a request to appear as Petitioners' qualified representative prior to seeking the extension.

21. In support of this argument, the City cites section 120.569(1)(e) which requires that "all pleadings, motions, or other papers *filed in a proceeding* must be signed by the party, the party's attorney, or the party's qualified representative." (emphasis added). The City argues that Mr. Hannon's request for enlargement of time was invalid because it was filed on behalf of Petitioners before he applied to appear on their behalf as a qualified representative.

22. A proceeding before the Division does not commence until an affected person has requested a hearing. *See Lightsey v. FWC*, Case No. 19-5210, ¶¶12-13 (Fla. DOAH Mar. 31, 2020). Mr. Hannon's request for enlargement of time preceded the Petition; thus, it preceded commencement of the proceeding. Mr. Hannon was not required to be qualified to represent Petitioners, pursuant to rule 28-106.106(2)(a), prior to requesting an enlargement of time from the Department.

23. The City also argues that the request for enlargement of time was also invalid because none of the Petitioners had given Mr. Hannon explicit authority to request it on their behalf prior to filing the request. The City cites no caselaw on which the undersigned can rely in making such a legal conclusion. While Mr. Hannon had not met personally with any of the Petitioners prior to seeking the enlargement of time, he had knowledge of their interest in challenging the ERP from third parties. Without clear precedent on this issue, and given that waiver is disfavored in the law, the undersigned is loath to dismiss the Petition on that basis.

24. Finally, the City argues in its Proposed Recommended Order that the request for enlargement of time was invalid because it was not based on good cause and that excusable neglect for late-filing was not established. Neither of these grounds were included in the Prehearing Stipulation nor were they tried by consent. As such, these arguments have been waived, and are beyond the undersigned's jurisdiction.

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition was timely filed. The provisions of this Interlocutory Order will be incorporated into the undersigned's recommended order issued following the final hearing on the merits of the Petition.

DONE AND ORDERED this 31st day of October, 2023, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
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