

**BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In Re: Paul and Lori Maurer,
Petitioners.

OGC Case No. 14-0430

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FINAL ORDER DENYING PETITION FOR DECLARATORY STATEMENT

On July 31, 2014, Paul and Lori Maurer, the Petitioners, filed a Petition for Declaratory Statement ("Original Petition") requesting the opinion of the Florida Department of Environmental Protection ("Department") concerning: (1) whether the Department has preempted authority over mangroves within Sarasota County, Florida; and (2) whether the Department has delegated its authority pursuant to the "Mangrove Trimming and Preservation Act," sections 403.9321 – 403.9333, Florida Statutes, to Sarasota County.

On August 1, 2014, the Petitioners filed a second Petition for Declaratory Statement ("Second Petition"), requesting the opinion of the Department regarding whether (1) section 373.4211, Florida Statutes, is the law that prescribes the method for delineating wetlands in the State of Florida; (2) whether the methodology adopted in chapter 62-340, Florida Administrative Code, ratified by the legislature in section 373.4211, Florida Statutes, "is to be applied consistently throughout the state regardless of the environmental variations" and whether such criteria is binding upon all political subdivisions of the State of Florida; (3) whether Sarasota County is bound by such criteria for delineating wetlands; (4) whether the Department is charged with enforcing

section 373.4211, Florida Statutes, and chapter 62-340, Florida Administrative Code.

The Second Petition concluded with a blanket statement that the Petitioners have “done [their] due diligence in all aspects of our endeavors to fill this mosquito control ditch” and requested the Department’s opinion as to what the Petitioners did wrong.

On August 7, 2014, the Petitioners filed an “Amendment to Petitions for Declaratory Statement Before the Department of Environmental Protection dated: 7/31/2014” (Amendment to Petitions) to amend their Original Petition and Second Petition to respond to each sentence in rule 28-105.001, Florida Administrative Code, as to why Petitioners’ Original Petition and Second Petition qualify for a declaratory statement.¹

On August 11, 2014, Petitioners filed a “Clarification Request for Petition for Declaratory Statement Mangroves and 1996 Mangrove Act Before the Department of Environmental Protection Dated: 7/31/2014” (the Clarification of Petition). The Clarification of Petition essentially restated the matters outlined in the Original Petition and added an additional question; specifically Petitioners inquire as to “what precise authority has the Department delegated or obtained over mangroves.”

¹ Rule 28-105.001, Florida Administrative Code, provides the following:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner’s particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

The Department published notice of receipt of the Second Petition and Original Petition on August 8, 2014,² and August 14, 2014,³ respectively, in the *Florida Administrative Register*. The Department did not publish notice of receipt of the Petitioners' subsequent filings since those filings did not substantively amend the subject matter on which the Original Petition and Second Petition were based.

As of the date of this Final Order, no third party petition for leave to intervene was filed pursuant to rule 28-105.0027, Florida Administrative Code.

FACTUAL BACKGROUND

For the purpose of this Final Order, factual allegations were derived from the above-referenced filings. Pursuant to rule 28-105.003, Florida Administrative Code, the Department relies on the statements of facts as presented by Petitioners in the disposition of the Original Petition, Second Petition, and Clarification of Petition, but takes no position with regard to the truth or accuracy of such facts.

1. Petitioners allege that they own real property located at 8215 Manasota Key Road, Englewood, in Sarasota County, Florida (Parcel Identification Number 0489-10-0012).

2. Petitioners have owned the property since 2009.

3. Between 2009 and early 2014, Petitioners began clearing and filling an alleged mosquito control ditch within their property. Such activities also impacted mangroves on Petitioners' property.

² Volume 40, Number 154, pages 3302-3303.

³ Volume 40, Number 158, pages 3442-3443.

4. During the course of Petitioners' activities, Sarasota County, through its Water and Navigational Control Authority, exerted jurisdiction over these activities conducted within the mosquito control ditch and took enforcement against Petitioners for clearing and filling the mosquito control ditch on Petitioners' property. As a result, Sarasota County ordered Petitioners to perform restoration of the property and pay fines and costs.

5. Petitioners allege that they were conducting activities within the mosquito control ditch under an exemption in subsection 373.4211(25), Florida Statutes.⁴

6. Petitioners also allege that at some point they tried to obtain an exemption verification from the Department for the activities conducted within the mosquito control ditch, but were told by Department staff that an exemption verification was not necessary.

7. Petitioners assert that they have documentation in the form of surveys, aerials, and maps to show that they qualify for the exemption.

⁴ Section 373.4211(25), Florida Statutes, ratified rule 62-340.750, Florida Administrative Code, with some modifications to the rule language. Petitioners mistakenly allege that rule 62-340.750, Florida Administrative Code, provides an exemption from the need to obtain an environmental resource permit under part IV of chapter 373, Florida Statutes. Instead, rule 62-340.750, Florida Administrative Code, exempts certain activities that are within lands that have become wetlands or surface waters solely due to mosquito control activities undertaken by a governmental mosquito control program and not previously surface waters or wetlands prior to the mosquito control activities from *specific rule criteria* for permitting an environmental resource permit under part IV of Chapter 373, Florida Statutes.

CONCLUSIONS OF LAW

8. The purpose of a declaratory statement is set forth in section 120.565, Florida Statutes. This statute provides, in pertinent part:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

9. Rule 28-105.001, Florida Administrative Code, which implements the above referenced statutes provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

10. Based on the facts presented by Petitioners in the Original Petition, Second Petition, Amendment to Petitions, and Clarification of Petition, Petitioners are not entitled to a declaratory statement on the questions presented therein.

Original Petition and Clarification of Petition

11. For the Original Petition and Clarification of Petition, Petitioners' questions are rephrased as follows: Has the Department delegated its authority to Sarasota

County to administer the Mangrove Trimming and Preservation Act (the “Act”) within Sarasota County.

12. First, the question is not appropriate for a declaratory statement because it does not require an interpretation of the applicability of the Act to Petitioners’ set of circumstances. While the Act provides the authority for a local government to obtain delegation from the Department to administer the Act, there is nothing in the language of the Act that the Department could interpret to determine whether Sarasota County has been delegated such authority. Instead, facts regarding which local governments in Florida have been delegated the authority to administer the Act are publicly available on the Department’s website. See

http://www.dep.state.fl.us/water/wetlands/mangroves/mangrove_trimming.htm

13. Second, the Original Petition and Clarification of Petition must be denied because a petition for declaratory statement is not a proper means for determining the conduct of a third-party (*i.e.*, Sarasota County). R. 28-105.001, Fla. Admin. Code; see also Manasota-88, Inc. v. Gardinier, Inc., 481 So. 2d. 948 (Fla. 1st DCA 1986) (upholding agency’s denial of petition for declaratory statement concerning the applicability of air pollution permit statutes to a third party). Here, Petitioners seek the Department’s opinion as to the applicability of the Act to a third-party—Sarasota County. More specifically, Petitioners seek a determination concerning Sarasota County’s authority to undertake an enforcement action for activities concerning mangroves on

Petitioners' property in light of certain provisions in the Act.⁵ Rule 28-105.001, Florida Administrative Code, expressly prohibits the issuance of a declaratory statement that determines the conduct of another person other than the petitioner.

14. Third, the Original Petition and Clarification of Petition should be denied as they present issues pending in related litigation. It is clear from the Petitioners' allegations that Sarasota County has taken enforcement against Petitioners for activities related to mangroves on Petitioners' property. It is well settled that agencies must deny a petition for declaratory statement on issues currently pending in related litigation. Novick v. Dep't of Health, Bd. of Med., 816 So. 2d 1237, 1240 (Fla. 5th DCA 2002) (citing Couch v. Dep't of Health and Rehab. Services, 377 So. 2d 32 (Fla. 1st DCA 1979); Fox v. State, Bd. of Osteopathic Med. Examiners, 395 So. 2d 192 (Fla. 1st DCA 1981) (upholding denial of petition for declaratory statement regarding issues raised in administrative proceeding). Any issues concerning Sarasota County's authority to regulate mangroves on Petitioners' property is a matter that should be litigated in the related enforcement proceeding rather than addressed in a declaratory statement.

⁵ Pursuant to sections 403.9324(1), Florida Statutes, "[s]ections 403.9321-403.9333 and any lawful regulations adopted by a local government that receives a delegation of the department's authority to administer and enforce the regulation of mangroves as provided by this section shall be the sole regulations in this state for the trimming and alteration of mangroves on privately or publicly owned lands." All other local government regulation were abolished 180 days after June 15, 1995, the effective date of the Act. § 403.9324(3), Fla. Stat. (2014). However, a local government may request delegation to regulate the trimming and alteration of mangroves at any time. § 403.9324(3), Fla. Stat.

Second Petition

15. In the Second Petition, Petitioners' first three questions are rephrased as follows: Is Sarasota County required to apply the methodology in chapter 62-340, Florida Administrative Code, to delineate the landward extent of wetlands within Sarasota County?

16. First, for the reasons stated above, this question is not proper for a declaratory statement because Petitioners seek a determination of the applicability of chapter 62-340, Florida Administrative Code, to a third-party, Sarasota County.

17. Second, any issues concerning the applicability of any provisions in chapter 62-340, Florida Administrative Code, are matters that should be addressed in Sarasota County's enforcement proceeding. As stated above, issues concerning matters in related litigation are not proper for a declaratory statement.

18. Even assuming *arguendo*, that it was proper for the Department to issue a declaratory statement concerning whether Sarasota County must use chapter 62-340, Florida Administrative Code, to delineate wetlands, Petitioners answer this question by alleging in the Second Petition that the county ordinances specifically cite to chapter 62-340, Florida Administrative Code, as the methodology used to delineate wetlands. As such, there is no controversy or dispute regarding whether Sarasota County should apply chapter 62-340, Florida Administrative Code, to delineate wetlands.

19. The fourth question presented in the Second Petition concerning whether the Department is charged with enforcing chapter 62-340, Florida Administrative Code, must also be denied because it involves issues pending in related litigation.

20. It is clear from the line of questioning in the Second Petition that Petitioners dispute the position taken by Sarasota County in its enforcement proceeding in light of alleged conversations with Department staff with regard to whether Petitioners' activities qualify under the provisions of rule 62-340.750, Florida Administrative Code, which creates exemptions from certain permitting criteria in Part IV of chapter 373, Florida Statutes. Specifically, certain activities conducted within surface waters or wetlands that were created solely because of mosquito control activities undertaken as part of the governmental mosquito control program. Issues concerning any applicable exemptions as a defense to Sarasota County's enforcement proceeding are matters that Petitioners should litigate in the enforcement proceeding. As stated above, issues concerning matters pending in related litigation is not proper for a declaratory statement.

21. The fifth question in the Second Petition, in which Petitioners requests a determination of what they have done wrong, must be denied as it requests a determination of conduct that occurred in the past. A declaratory statement is not proper to approve or disapprove conduct that has already occurred. See e.g., Novick v. Dept of Health, Bd. of Med., 816 So. 2d 1237 (Fla. 5th DCA 2002) ("Although there may be valid exceptions, a petition for a declaratory statement which seeks approval of disapproval of conduct which has already occurred is properly denied."). In fact, courts have opined that the purpose and benefit of the declaratory statement process is to allow the public to obtain binding advice from an agency to resolve ambiguities concerning statutes, rules, or orders as applied to petitioner's own circumstances to

enable him to choose a proper course of action in the planning of future affairs. See Adventist Health Sys. / Sunbelt, Inc. v. Agency for Health Care Admin., 955 So. 2d 1173, 1176 (Fla. 1st DCA 2007) (citing Novick v. Dep't of Health, Bd. of Med., 816 So. 2d 1237 (Fla. 5th DCA 2002)).

22. In addition, the propriety of Petitioners' activities that are the subject of an enforcement proceeding with Sarasota County are matters that concern pending related litigation. As stated above, issues concerning matters in related litigation are not proper for a declaratory statement.

Amendment to Petitions

23. The Amendment to Petitions did not present any new questions to address, but presented additional information for the Department to consider in its review of the Petitioners' filings. Therefore, the Amendment to Petition was not treated as a petition for declaratory statement on its own, but was considered in the disposition of the Original, Second Petition, and Clarification of Petition.

DISPOSITION

IT IS THEREFORE ORDERED:


The Petitioners' request for a declaratory statement, as collectively presented in their Original Petition, Second Petition, Amendment to Petitions, and Clarification of Petition, is **DENIED**.

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 Rules 9.110 and 9.190, 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.

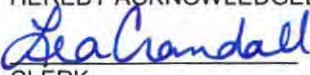
DONE AND ORDERED this 27th day of February, 2015, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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


CLERK

2-27-15
DATE

Copies furnished to:
Paul and Lori Maurer
Krystle Hoenstine, Esq.