STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

S. R. PERROTT, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**OGC CA7 NO. 23-1309**
		DOAH CASE NO. 23-4286
BELVEDERE TERMINALS COMPANY, LLC,	)	
and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
_____/		

FINAL ORDER DISMISSING PETITION

On March 5, 2024, an administrative law judge (ALJ) from the Division of Administrative Hearings (DOAH) issued a Recommended Order of Dismissal in these proceedings (attached as Exhibit A). The general issue presented is whether publication of notice regarding agency action was sufficient, a question which determines whether the Petitioner's initial petition was timely.

Application Background and Procedural History

The Department of Environmental Protection (the Department) issued a Minor Air Construction Permit No. 1270233-001-AC (Permit) to Respondent, Belvedere Terminals Company, LLC (Belvedere). The Permit authorizes Belvedere to construct and operate a petroleum bulk station with an aboveground tank farm and truck loading bays. A local newspaper, The Hometown News – Ormond Beach edition (Hometown News), published notice of the Department's permit decision on July 7, 2023. Under Department rules, an interested party waives its rights to an administrative petition if it fails to file its petition within a defined period

after "receipt of notice of agency action," an event which is defined to include published notice. Fla. Admin. Code R. 62-110.106(2).

Petitioner filed its initial petition on August 15, 2023, after the notice period shown in the published notice. The Department issued orders dismissing the initial petition and an amended petition as untimely, providing leave to amend (and to contest the timeliness of the initial petition) in both instances. Petitioner filed a Second Amended Petition, which the Department forwarded to DOAH. Petitioner alleged that its initial petition was timely because the applicant's published notice and its proof of publication did not comply with applicable rules and statutes. The ALJ ordered a bifurcated proceeding, scheduling an initial evidentiary hearing to determine the timeliness of the initial petition. The ALJ conducted the hearing and concluded in his Recommended Order that the Petitioner had not timely filed its initial petition.

The Recommended Order fully describes the proceedings before DOAH. A transcript of the proceedings is in the record, and was available to the ALJ when he prepared the Recommended Order. References to statutes are to the Florida Statutes (2023).

Petitioner's Exceptions are addressed as follows.

Exception 1

In Footnote 1 to the Recommended Order, the ALJ determined that the Petitioner had failed to plead one of Petitioner's arguments in its proposed recommended order – namely, that Hometown News did not publish the notice in a "legal advertisements" section. *See* Fla. Admin. Code R. 62-110.106(5). Petitioner argues that ALJ erred in concluding that it had waived the argument by failing to raise the issue in the Second Amended Petition.

In considering the ALJ's conclusions in the Recommended Order, the reviewing agency may only reject or modify conclusions of law within the agency's substantive jurisdiction, i.e.,

policy matters deemed within the agency's "area of expertise." *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001), citing § 120.57(1)(j), Fla. Stat. Routine procedural matters arising during a formal hearing at DOAH, as well as other issues typically resolved by judicial offers, are not within the Department's substantive jurisdiction. *Id.* (addressing a dispute over application of collateral estoppel); *see also G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1263 (Fla. 5th DCA 2004) (Department lacked substantive jurisdiction to reverse ALJ's conclusions on jurisdiction to consider petition for attorney's fees). The conformity of pleadings is not a matter within the Department's substantive jurisdiction.

Petitioner also contends that Footnote 1 contains an "incorrect" finding of fact, and asks for substituted findings. Petitioner does not contend that any finding in Footnote 1 lacks support by competent substantial evidence, or that the proceedings did not comply with the essential requirements of the law. Therefore, it would be improper to make new or substituted findings of fact. § 120.57(1)(l), Fla. Stat. *Heifetz v. Dep't of Bus. Regul.*, 475 So. 2d 1277, 1282 (Fla. 1st DCA 1985); *Gross v. Dep't of Health*, 819 So. 2d 997, 1005 (Fla. 5th DCA 2002). For these reasons, Exception 1 is denied.

Exception 2

In paragraph 30 of the Recommended Order, the ALJ found that the Department received two public comments in response to the public notice. Petitioner contends that the ALJ should have characterized one additional email as a public comment. Petitioner does not contend that any finding lacks support by competent substantial evidence, or that the proceedings did not comply with the essential requirements of the law. Thus, the Department is not authorized to re-weigh the evidence in its final order; the ALJ has the sole responsibility to draw inferences from the evidence. *Wills v. Florida Elections Comm'n*, 955 So. 2d 61, 62 (Fla. 1st DCA 2007); *Prysi v.*

Dep't of Health, 823 So. 2d 823, 825 (Fla. 1st DCA 2002) . The reviewing agency cannot reject an ALJ's findings unless there is no competent, substantial evidence from which the findings could be reasonably inferred. *Id.* Petitioner has provided no legal authority to reverse or modify the findings in paragraph 30.

In paragraph 31, the ALJ made the ultimate finding that the Published notice complied with rules 62-110.106(7) and 62-210.350, Florida Administrative Code. Petition reiterates the argument made in Exception 1, which is denied for the reasons stated above. Petitioner also appears to make an argument regarding paragraphs 30 and 31 collectively: that because of "procedural errors" and "resultant public confusion," the Department should modify those paragraphs and find that the notice was not "legally sufficient." Petitioner does not argue and the record does not suggest that the proceedings failed to comply with the essential requirements of the law. *See* § 120.57(1)(l), Fla. Stat. The ALJ's findings do not demonstrate any procedural errors or resultant public confusion, and Petitioner offers no legal authority to make a substituted finding in its favor on that issue. Under the circumstances, the Department does not have authority to make new or substituted findings. For these reasons, Exception 2 is denied.

Exception 3

In paragraph 37 of the Recommended Order, the ALJ made findings about the significance of the address stated in the published notice, namely that the notice stated the project address as "874 Hull Avenue," as described in the local property appraiser's website before publication. As discussed at detail in the Recommended Order, the local tax collector's office later listed the location as "874 Hull Road." In paragraph 37, the ALJ noted testimony regarding internet searches for maps of the project area, and found that the use of one term over the other (Road versus Avenue) would not direct a user to any other parcel.

In Exception 3, Petitioner does not argue that paragraph 37 is unsupported by competent substantial evidence. Petitioner argues instead that the ALJ interpreted rule 62-110.106(7) in that paragraph, and that the ALJ erred in his interpretation. Petitioner's exception presupposes without explanation that "874 Hull Avenue" is the wrong address and that "874 Hull Road" is the right address.[1] Petitioner asks for substituted findings in place of paragraph 37.

To "interpret" a rule means to ascertain the meaning of the rule, or to determine how the text best applies to a particular set of facts. *See Interpret, Black's Law Dictionary* (11th ed. 2019); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 53-55, 430 (2012). Paragraph 37 does not mention any rule in paragraph 37 or even suggest how a rule might apply; it only addresses the consequences of internet searches. There is no issue about rule interpretation in paragraph 37; Exception 3 is simply a request, without any supporting legal justification, to make new and substituted findings. For these reasons, Exception 3 is denied.

Exceptions 4, 5, and 6

In paragraph 39, the ALJ characterized the evidence on whether the difference between "Road" and "Avenue" led to any confusion. In paragraph 41, the ALJ expanded on his characterization of the evidence on whether the difference between "Road" and "Avenue" led to the confusion, with the observation that there was no "competent substantial and persuasive evidence" to support that proposition. In paragraph 42, the ALJ reiterated his findings on the issue of confusion and the terms "Road" versus "Avenue," with additional findings regarding the timing and background of the publication.

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[1] In paragraph 94 of the Recommended Order, the ALJ found that the public notice provided an accurate and correct address. Petitioner does not provide a cogent reason to modify or reject that more general finding.

In these exceptions, Petitioner points to two ambiguous portions of the record, consisting of multiple hearsay, and contends that the ALJ mischaracterized the record because those pieces of evidence prove confusion. The ALJ evidently did not infer, from the portions of the record cited by Petitioner, that such confusion existed. If those portions could even theoretically support such an inference, those portions of the record did not persuade him on that issue. As discussed above, it is the responsibility of the ALJ to draw reasonable inferences from the record, and I cannot re-weigh the evidence. Petitioner again asks for substituted findings, a request I have no authority to grant. For these reasons, I deny Exceptions 4, 5, and 6.

Exceptions 7, 8, 9

In paragraphs 59, 60, and 62 of the Recommended Order, the ALJ interpreted rule 62-110.106, a rule within the chapter on the Department's Exceptions to the Uniform Rules of Procedure. *See* § 120.54(5), Fla. Stat. (describing authority of agencies to adopt exceptions to procedural rules adopted by the Administration Commission). The ALJ reasoned that because notice was actually published, a deficiency in the form of the proof of publication would not extend the time for filing a petition and would not establish an independent reason to deny the permit. [Recommended Order ¶ 59]. In essence, if the applicant were able to prove in a de novo proceeding that the publication itself complied with the applicable statute and rule, the notice would be sufficient to create a point of entry when assessing the timeliness of a later petition.

As the rule itself states, public notice is an essential and integral part of the state environmental permitting process. Fla. Admin. Code R. 62-110.106(9). For this reason, the interpretation of rule 62-110.106 is within the Department's substantive jurisdiction. *See* § 120.57(1)(j), Fla. Stat. However, for the reasons that follow, it would be erroneous to reject or modify the conclusions of law in those paragraphs. The following explanation will begin by

summarizing pertinent parts in the rule, and then it will address the substance of Petitioner's arguments in the order presented.

Subsections within rule 62-110.106 create detailed requirements for publication and for providing proof of publication, together with varying consequences. Subsection (5) of the rule states that the Department may require the applicant to publish notice of certain events, and that the applicant may publish notice at its own option. Subsection (5) also requires the applicant to provide proof of publication to the Department for those notices within seven days of publication; it does not, however, state the consequences for failing to provide the notice within the seven-day deadline. Subsection (6) describes one of those events triggering publication: the Department may require the applicant to publish notice of the permit application, and the applicant must do so within fourteen days after a "complete application" is filed. *See* § 120.60(1), Fla. Stat. (addressing the deadline for agency response to a "completed application"). Subsection (7) provides publication requirements for notices of approval and denial in specific regulatory programs. This subsection spells out consequences; the deadline for agency action in section 120.60(1), Florida Statutes, is tolled for a period of fourteen days after the applicant provides proof of publication. Subsection (11) provides that the failure to publish "shall be an independent basis" for denial of an application; it does not mention whether, or when, a failure to provide proof of publication provides such a basis for denial.

Petitioner argues, for a number of different reasons, that the publication of notice under rule 62-110.106 is sufficient only if the applicant files the proof of publication with the Department before the seven-day deadline in subsection (5) expires. Petitioner also argues that in considering whether the publication was sufficient, the Department may only consider the content of the proof of publication. Conversely, the argument follows, the Department cannot

consider proof of publication offered at a later time, either in a later-filed affidavit or during a de novo proceeding. These arguments are inconsistent with the text and structure of the rule.

The ALJ observed in paragraph 59 that the text of the rule authorizes a potentially serious sanction for the applicant's failure to publish – delay in issuance or denial of the application. In contrast, the rule creates no express sanction when it submits a proof of publication that might not strictly comply with section 50.051, Florida Statutes. Considering the language of the rule itself and the negative implication described in paragraph 58, the ALJ's rule interpretation is more reasonable than the one offered by Petitioner.

Contrary to Petitioner's argument, the ALJ's interpretation would not render the seven-day deadline in subsection 62-110.106(5) useless. The deadline would tend to assure that where publication of notice regarding the application is required, the Department can make an informed decision on the application before its deadline to process the application. *See* § 120.60(1), Fla. Stat. (addressing agency deadlines for agency to notify applicant of apparent errors or omissions); Fla. Admin. Code R. 62-4.055 (similar requirement). The deadline also promotes prompt resolution of any delay in providing proof of publication for a notice of intent.

On the other hand, Petitioner's interpretation cannot be easily harmonized with other parts of the rule, or with existing law. It would be incongruous to suppose that an overlooked error or admission in the application process, particularly a paperwork error, should be deemed fatal to an application when discovered after permit issuance, *see* § 120.60(1), Fla. Stat., when the delay or failure to publish does not necessarily bear such a harsh sanction. It is also counterintuitive to suppose that a paperwork error cannot be cured during a de novo proceeding. *See Hamilton Cnty. Bd. of Cnty. Comm'rs v. State Dept. of Envtl. Regulation*, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991) (addressing the consideration of additional evidence presented in an

administrative hearing). Petitioner has not offered any persuasive argument that the ALJ erred in his interpretation of the rule.

For these reasons, the rule interpretations offered by Petitioner in Exceptions 7, 8, and 9 are not more reasonable than the ALJ's rule interpretations. Exceptions 7, 8, and 9 are denied.

Exception 10

In paragraph 64, the ALJ made findings regarding compliance with rule 62-110.106(6), Florida Administrative Code. This rule subsection authorizes the Department to require applicants to publish a notice of application if certain factors lead the Department to expect that the project will cause heightened public concern or a likelihood of requests for administrative proceedings. The ALJ observed that heightened public concern would "logically relate" to air omissions. Petitioner alleges that the ALJ misinterpreted the rule, arguing that the ALJ stated that the question only relates to air emissions.

Petitioner's exception must be denied for the simple reason that the ALJ did not state that air emissions were the only pertinent consideration. The remaining findings on this issue [Recommended Order ¶¶ 65-73] show that the ALJ did not limit his consideration to air emissions. To the extent that the ALJ interpreted the rule in paragraph 64, his interpretation is consistent with the plain language of the rule; air emissions would logically relate to the potential effect on the environment.

Petitioner makes a related argument – that the Department should have, but did not, evaluate the size, location, or "controversial nature" of the project. However, the text of the rule does not require the Department to perform a formal analysis, prepare a checklist, or explicitly balance each of the factors to determine whether the application should publish a notice of application. Petitioner offers no persuasive argument in support of its proposed interpretation.

Petitioner has not shown that any of its proposed rule interpretations are more reasonable than the ALJ's. Exception 10 is denied.

Exception 11

In paragraph 66, the ALJ quoted testimony regarding the Department's decision not to require the applicant to publish notice of the application. The ALJ made the ultimate findings that the Department did not expect the project to result in heightened public concern or a greater likelihood of requests for administrative proceedings, and that its expectations were reasonable at the time. Petitioner asks for substituted findings of fact, based on the theory that the Department did not consider the size or location of the facility when it made the decision not to require publication. Petitioner does not contend that any finding lacks support by competent substantial evidence, or that the proceedings did not comply with the essential requirements of the law.

The ALJ has the authority, as the fact finder, to determine whether a given set of facts constitutes a violation of a rule. *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995). As discussed above, it is the responsibility of the ALJ to draw reasonable inferences from the record, and I cannot re-weigh the evidence under the circumstances presented. Exception 11 is denied.

Exception 12

In footnote 3 to paragraph 68, the ALJ explained some of his reasoning in the fact-finding process; specifically, he explains why he did not make an inference that would have otherwise supported his ultimate finding. Petitioner argues that this footnote should be rejected because it is not a finding of fact or a conclusion of law. Petitioner offers no authority for the proposition that a finder of fact may not explain his reasoning. Exception 12 is denied.

Exception 13

In paragraph 71, the ALJ made findings on the information available to the Department when it decided not to require the applicant to publish notice of the application. Petitioner does not argue that the findings lack support by competent substantial evidence, or that the proceedings did not comply with the essential requirements of the law. Therefore, it would be improper to make new or substituted findings of fact, as requested by Petitioner. Exception 13 is denied.

Exception 14

In paragraph 72, the ALJ made a narrow finding regarding the effect of the Department's decision not to require publication of an application notice. The ALJ found that the decision did not adversely affect rights or remedies available for the Petitioner to challenge the Permit, and did not affect the fairness of the proceeding. To paraphrase, the decision did not actually cause any prejudice to the Petitioner. Petitioner asks for a substituted set of findings, largely on unrelated issues. Petitioner does not contend that any finding lacks support by competent substantial evidence, or that the proceedings did not comply with the essential requirements of the law.

This question of causation is susceptible to ordinary methods of proof, *see Martuccio v. Dep't of Prof'l Regulation, Bd. of Optometry*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993), and is not otherwise within the Department's substantive jurisdiction. The Department is not authorized to re-weigh the evidence under the circumstances presented; the ALJ has the sole responsibility to draw inferences from the evidence. Exception 14 is denied.

Exception 15

In paragraph 73, the ALJ found that the Petitioner did not offer persuasive evidence that the Department had a reason, at the time the application was filed, to believe that it would be necessary to require publication of a notice of the application. The ALJ then made the ultimate finding that the Department's conclusion was reasonable. Petitioner again asks for substituted findings. Petitioner does not contend that any finding lacks support by competent substantial evidence, or that the proceedings did not comply with the essential requirements of the law.

Again, the reviewing agency is not authorized to re-weigh the evidence; the ALJ has the sole responsibility to draw inferences from the evidence. Petitioner did not persuade the ALJ that the Department had reason to make a different decision. The ALJ made the ultimate finding that the Department's decision was reasonable, and that finding was within his authority. *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995). Exception 15 is denied.

Exceptions 16, 17, and 18

In paragraphs 79, 90, and 92, the ALJ made ultimate findings on the timeliness of the initial petition, the creation of a point of entry at the time of publication, and the sufficiency of the published notice. Petitioner reiterates its previous exceptions on a number of findings and conclusions of law addressed above in this order. For the reasons stated above in reference to those findings and conclusions, Exceptions 16, 17, and 18 are denied.

Exception 19

In paragraph 94, the ALJ made a series of findings regarding the address mentioned in the public notice, including the finding that the address was accurate and correct. As with its previous exceptions, Petitioner reiterates its previous exceptions on multiple findings and

conclusions of law as addressed above. For the reasons stated above in references to those findings and conclusions, Exception 19 is denied.

Petitioner also argues that because the notice was insufficient, the permit should be rescinded. Here, Petitioner appears to mischaracterize the scope of proceedings. The question presented at this stage of proceedings is whether the petition should be dismissed as untimely. The DOAH proceeding did not proceed to the merits of the permit. However, the petition is dismissed, so the distinction is not significant.

CONCLUSION

Having considered the applicable law and the Recommended Order of Dismissal, and otherwise being duly advised, it is ORDERED:

A. The Recommended Order of Dismissal is adopted and incorporated herein by reference, in its entirety.

B. The petition of S.R. Perrott, Inc. together with its amendments, is dismissed as untimely, and this dismissal is final agency action.

C. Minor Air Construction Permit No. 1270233-001-AC is approved.

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 19th day of April, 2024, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

SHAWN HAMILTON
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.

Deputy CLERK

4/19/24
DATE

CERTIFICATE OF SERVICE

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

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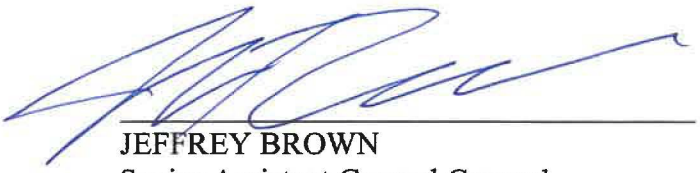
this 19th day of April, 2024.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

S.R. PERROTT, INC.,

Petitioner,

vs. Case No. 23-4286

BELVEDERE TERMINALS COMPANY, LLC,
AND DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents,

_____/

RECOMMENDED ORDER OF DISMISSAL

Pursuant to notice, a hearing was held in this case on January 10, 2024, by Zoom conference, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner S.R. Perrott, Inc.:

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Exhibit A

For Respondent Department of Environmental Protection:

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STATEMENT OF THE ISSUES

The issues to be determined by this Order are whether the Written Notice to Issue Air Permit and publication of the Public Notice to Issue Air Permit for the Ormond Beach Terminal was sufficient; and whether the Petition for Administrative Hearing was timely.

PRELIMINARY STATEMENT

This case arose upon the issuance of a Minor Air Construction Permit No. 1270233-001-AC ("Permit") by the Department of Environmental Protection ("DEP") to Respondent, Belvedere Terminals Company, LLC ("Belvedere"), for the new Ormond Beach Terminal, a petroleum bulk station with its main portions consisting of an aboveground tank farm and multiple truck loading bays ("proposed facility"). The Public Notice of Intent to Issue Air Permit ("Public Notice") was published in the Hometown News – Ormond Beach edition ("Hometown News") on July 7, 2023.

Petitioner filed a Petition for an Administrative Hearing with DEP on August 15, 2023 ("First Petition"). On August 29, 2023, DEP dismissed the First Petition with leave to amend. Petitioner subsequently filed an Amended Petition on September 25, 2023, and a Second Amended Petition for Administrative Hearing ("Second Amended Petition") on October 5, 2023. The Second Amended Petition was forwarded to DOAH.

On November 16, 2023, a telephonic case status conference was held, during which it was agreed upon by the parties that a preliminary bifurcated hearing on the adequacy of the published notice and timeliness of the Petition ("Phase I" proceeding) would allow for a more efficient proceeding, with there being no need for a hearing on the merits if it was determined that the Petition was not timely filed. Pursuant to notice, a hearing to address those issues was scheduled for a Zoom conference on January 10, 2024.

After a requested extension of the time for filing exhibits and the joint pre-hearing stipulation ("JPS") was granted, both were timely filed on January 9, 2024. The stipulations of fact are incorporated herein. The JPS also identified the following as being the issues for disposition:

> 1. Whether the Public Notice was legally sufficient.
>
> 2. Whether the Hometown News meets the requirements of section 50.011(1)(a), Florida Statutes, "[h]as an audience consisting of at least 10 percent of the households in the county or municipality, as determined by the most recent decennial census, where the legal or public notice is being published or posted, by calculating the combination of the total of the number of print copies reflecting the day of highest print circulation, . . . as certified biennially by a certified independent third-party auditor, and the total number of online unique monthly visitors to the newspaper's website from within the state, as measured by industry-accepted website analytics software."
>
> 3. Whether Perrott's Permit challenge is untimely.
>
> 4. Whether a Notice of Application should have been published pursuant to Florida Administrative Code Rule 62-110.106(6).

> 5. Whether the proofs of publication Belvedere provided to the Department were legally sufficient and timely received. (Belvedere disagrees that this is an issue of fact appropriately in this phase of the proceeding).[1]

On January 10, 2024, the hearing was held on the Phase I issues. At the hearing, testimony was received from Gary Connors, Petitioner's Executive Vice-President; Eva Connors McMullin, Petitioner's Assistant General Manager and Corporate Secretary; Martin Costello, DEP's Project Review Engineer; David Read, DEP's Air Permitting Manager; Jeff Koerner, DEP's Director of Air Resource Management; and Kirk Dougal, Group Publisher of the Hometown News. Joint Exhibits 1 through 10, and Petitioner's Exhibits 1, 2, and 4 were received in evidence.

A one-volume Transcript of the proceedings was filed on February 1, 2024. At the conclusion of the hearing, the parties agreed that post-hearing submittals would be due 10 days from the date of the filing of the Transcript, which, with the weekend, would have fallen on February 12, 2024. After the

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[1] Petitioner has, in its Proposed Recommended Order (PRO), alleged that the Public Notice violated other provisions of Florida Administrative Code Rule 62-110.106, notably that: "(iii) the Public Notice did not appear in the legal advertisements section of the Publication as required in Rule 62-110.106(5)." JPS at ¶71. The Second Amended Petition does not raise the issue of the location of the published notice in the Hometown News, either directly or by fair implication. The JPS does not identify publication at a location other than the legal advertisements section as an issue in dispute. The Order of Pre-hearing Instructions entered in this case specifically advised the parties that "The failure to identify issues of fact or law remaining to be litigated may constitute a waiver and elimination of those issues. *See Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc.*, 174 So. 3d 1037 (Fla. 4th DCA 2015)." As set forth in *Palm Beach Polo Holdings*, "[p]retrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced." *Id.* at 1039 (quoting *Broche v. Cohn*, 987 So. 2d 124, 127 (Fla. 4th DCA 2008).

Petitioner's statement that "[i]n this case, there is no evidence in the record that indicates that the Public Notice was published in the legal advertisements section of the Hometown News as required by rule" (PRO ¶ 119) is correct, not for any failure of proof, but because the issue was never raised. This case is limited to the five issues agreed upon by the parties in the JPS and identified, verbatim, above. Issues other than those identified in the JPS, including the location of the Public Notice in the Hometown News as argued at paragraphs 118 through 121 of Petitioner's PRO, have not been properly pled or preserved, have been waived, and are not subject to disposition in this proceeding.

filing of the Transcript, the parties requested an extension of time to file their PROs, and the date for filing was extended to January 16, 2024. Each of the parties timely filed PROs, which have been duly considered in the preparation of this Recommended Order.

The law in effect at the time DEP takes final agency action on the Permit being operative, references to statutes are to Florida Statutes (2023), unless otherwise noted. *Lavernia v. Dep't of Pro. Regul*, 616 So. 2d 53 (Fla. 1st DCA 1993).

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

The Parties

1. S.R. Perrott, Inc., is a family-owned food and beverage distributorship in Ormond Beach, Florida, established in 1962. Petitioner owns and operates a wholesale food and beverage warehouse located at 1280 North U.S. Highway 1, Ormond Beach, Florida. The warehouse is located northeast of the proposed facility, across from the Florida East Coast Railroad tracks.

2. DEP is an administrative agency of the State of Florida having the power and duty to protect Florida's air and water resources and to administer and enforce chapter 403, Florida Statutes, and the rules promulgated thereunder in Florida Administrative Code Title 62. Pursuant to this authority, DEP determines whether certain projects qualify for permits for activities which have the potential to cause air pollution.

3. DEP's Division of Air and Resources Management ("Division") oversees the Clean Air Act Program for Florida and permitting and compliance throughout the state. At all times pertinent to this case, the Division, located in Tallahassee, was handling air permitting duties for DEP's Central District

Office. Pursuant to chapter 403 and the rules promulgated thereunder, the Division issued the Permit.

4. Belvedere is a foreign limited liability company authorized to do business in Florida and is the applicant for the Permit, a minor source air construction permit. Belvedere's principal place of business is 200 Central Avenue, Fourth Floor, St. Petersburg, Florida 33701, which also serves as its mailing address.

The Property

5. The proposed facility is to be located on a currently undeveloped parcel of property, roughly triangular in shape ("Property"). Immediately adjacent to the proposed facility is Halifax Paving, a large paving company yard with exterior material storage; the Florida East Coast Railroad; Petitioner's warehouse and a commercial complex across from the railroad tracks; and vacant land to the east and northeast. Land uses within reasonable proximity of the proposed facility include residential and recreational areas, and the Ormond Beach Municipal Airport to the south.

The Permit Application

6. Belvedere, through its consultant Trinity Consultants, submitted an Initial Air Construction Permit Application ("Application") to DEP on or about March 2, 2023, "to construct a greenfield refined products terminal in Ormond Beach, Florida (Ormond Beach Terminal)."

7. The Application stated that the "facility will be located in Volusia County at 29° 19' 12.09" N longitude and 81° 6' 53.73" W latitude, on Harmony Avenue in Ormond Beach, FL 32174. The Universal Transverse Mercator (UTM) coordinates are 488.84 km east, 3,243.45 km north (zone 17). An area map is provided in Appendix A." Appendix B of the Application contained a "Site Exhibit," depicting the layout of the proposed facility within the Property.

8. Harmony Avenue is located adjacent to the southern end of the Property. The words "Hull Avenue" do not appear in the area map, the Site Exhibit, or the Initial Application.

9. Belvedere also submitted an electronic Application ("Electronic Application") through DEP's Electronic Permit Submittal and Processing System ("EPSAP"). The "Submitted Application Report" for Belvedere's Electronic Application lists the "Facility Location" as "Greenfield site off of Harmony Avenue, in Ormond Beach, FL," but the "Street Address or Other Locator" as "NA."

10. A "greenfield" site is one that has not been subject to a DEP permit in the past. It is not uncommon for an undeveloped property, or "greenfield site," to have no street address.

11. DEP staff used the UTM coordinates to locate the Property on the Volusia County Property Appraiser's website, which listed the "Physical Address" of the Property as "874 HULL AVE ORMOND BEACH 32174, and questioned why Belvedere had marked the "Street Address or Other Locator" as "NA" in the Electronic Application.

12. Mr. Read instructed Mr. Costello to contact Belvedere's consultants for clarification. Mr. Costello emailed Belvedere's consultants and requested "the physical address of this greenfield facility in Ormond Beach." Mr. Costello further advised that "if there is no address known for this site, then let me know and I will see if we can describe the physical site location in another way. The lack of a site address is the application ID issue."

13. On March 23, 2023, Emily Schwartz of Trinity Consultants emailed Mr. Costello stating, "I have confirmed with Belvedere the address for the Ormond Beach Terminal:

> **ORMOND BEACH**
> 874 Hull Avenue
> Ormond Beach, FL 32174"

14. Mr. Costello prepared a Technical Evaluation and Preliminary Determination ("TEPD") which made a preliminary determination of the proposed facility's compliance with air pollution regulations. Section 1.3 of the TEPD, entitled "Facility Description and Location," states that "[t]he new Ormond Beach Terminal will be located in Volusia County at a greenfield site located at 874 Hull Avenue in Ormond Beach, Florida. The UTM coordinates of the new facility are Zone 17, 488.84 kilometers (km) East, and 3,243.45 km North." In that section, Mr. Costello inserted two maps and one satellite photograph. Figure 1 is a map of the State of Florida that highlights the location of Volusia County. Figure 2 is a map of the location of the Property within Volusia County, and depicts major roads, including I-95 and U.S. Highway 1, the adjacent Florida East Coast Railroad line, and landmarks, including the Ormond Beach Municipal Airport. Figure 3 is a satellite photograph of the Property. Mr. Costello "grabbed [Figures 2 and 3] from a Google search from Google Maps." Figures 2 and 3 have pinpoints to the Property with the address "874 Hull Rd, Ormond Beach, FL 32174."

The Public Notice

15. On June 20, 2023, DEP issued a Written Notice of Intent to Issue Air Permit ("Notice of Intent") to Belvedere for the proposed facility that "will be in Volusia County at 874 Hull Avenue in Ormond Beach Florida." The Notice of Intent included the TEPD, the draft permit and appendices, and the Public Notice.

16. The Public Notice contained the name and address of the applicant, a brief description of the proposed facility and its location, the location of the Application file and the times when it is available for public inspection, a statement of DEP's intended action, and notification of the opportunity to request an administrative hearing, notification of the requirement that any comments be submitted within 14 days of the Public Notice, notification that a person whose substantial interests are affected by the proposed action must file a petition within 14 days of the publication of the Public Notice or receipt

of a written notice, whichever occurs first, and notification that mediation was not available.

17. The Public Notice also included a link to DEP's website through which the complete permitting file could be viewed.

18. DEP required Belvedere to publish the Public Notice at its own expense in a newspaper of general circulation that meets the requirements of sections 50.011 and 50.031, Florida Statutes.

19. On July 7, 2023, Belvedere published the Public Notice in the Hometown News. The Hometown News also published the Public Notice on that date at its website "hometownnewsvolusia.com" and the "floridapublicnotices.com" website.

20. The parties stipulated that the Hometown News is printed and published periodically at least once a week; contains at least 25 percent of its words in the English language; is available to the public generally for the publication of official or other notices and customarily containing information of a public character or of interest or of value to the residents or owners of property in the county where published, or of interest or of value to the general public; delivers at least 25 percent of its print copies to individuals' home or business addresses; is sold, or otherwise available to the public, at no less than 10 publicly accessible outlets; and has been in existence for more than two years. Thus, but for the issue of whether the Hometown News has an adequate circulation as discussed herein, the Hometown News meets the requirements of sections 50.011 and 50.031.

21. On July 13, 2023, Belvedere provided DEP Proof of Publication from the Hometown News.

22. The 14-day period for providing comments and for filing a petition for a hearing to challenge the Permit expired on July 21, 2023.

23. On August 1, 2023, having received no petitions challenging the issuance of the Permit, DEP issued the Permit to Belvedere.

24. Mr. Connors testified that he first learned of the Permit on August 2, 2023, during a visit to his barber. He advised Ms. McMullin that same day, after which she obtained a copy of the Permit from one of the owners of Halifax Paving. Ms. McMullin knew where the proposed facility was to be located when she reviewed the Permit. Ms. McMullin also performed a search for properties in Volusia County whose address began with "874 Hull." That search was sufficient to locate the Property. There was no other property in Ormond Beach, or in Volusia County, with a street address beginning with "874 Hull."

25. Petitioner filed its First Petition on August 15, 2023.

26. On August 29, 2023, DEP dismissed the First Petition with leave to amend. Petitioner filed an Amended Petition on September 25, 2023, and a Second Amended Petition on October 5, 2023.

27. DEP referred the Second Amended Petition to DOAH on November 1, 2023.

Legal Sufficiency of the Public Notice

A. Legal Requirements of the Public Notice

28. Rule 62-110.106(7), which applies to all notices of proposed agency action issued by DEP across its regulatory programs, provides, in pertinent part, that:

> (7) Notice of Proposed Agency Action on Permit Application. After processing a permit application, the Department shall give the applicant either a notice of permit issuance (or denial) or a notice of the Department's intent to issue (or deny). Each such notice shall comply with the requirements for format, content, and publication as set forth below in this subsection.
>
> * * *
>
> 1. The name of the applicant and a brief description of the proposed activity and its location,

> 2. The location of the application file and the times when it is available for public inspection,
>
> 3. A statement of the Department's intended action; and,
>
> 4. A notification of the opportunity to request an administrative hearing and mediation (if available)
>
> (d) The notice required by this subsection shall read substantially as follows:
>
> Notice of Intent to [insert "Issue" or "Deny" as appropriate] Permit The Department of Environmental Protection gives notice of its intent to [issue] [deny] a permit to [name and address of applicant] to [brief description of project or activity]. The application is available for public inspection during normal business hours, 8:00 a.m. to 5:00 p.m., Monday through Friday, except legal holidays, at [name and address of office]. [Insert the language setting forth the notice of rights, as provided in paragraph (12), of this rule, below.]

29. Florida Administrative Code Rule 62-210.350, which applies to notices of proposed agency action issued by DEP for stationary sources of air pollution, provides, in pertinent part, that:

> (1) Public Notice of Proposed Agency Action.
>
> (a) A notice of proposed agency action on permit application, where the proposed agency action is to issue the permit, shall be published by any applicant for:
>
> 1. An air construction permit,
>
> * * *
>
> (b) The notice required by paragraph 62-210.350(1)(a), F.A.C., shall be published in accordance with all otherwise applicable provisions of Rule 62-110.106, F.A.C. ...

> (c) Except as otherwise provided at subsections 62-210.350(2), (5), and (6), F.A.C., each notice of intent to issue an air construction permit shall provide a 14-day period for submittal of public comments.
>
> (d) An opportunity for administrative hearing shall be provided in accordance with Chapter 120, F.S., and Rule 62-110.106, F.A.C.

30. The Public Notice ran in the Hometown News on July 7, 2023. DEP received two public comments in response to the Public Notice. The first comment received, dated July 7, 2023, the date of publication, was a general critique of the wisdom of using fossil fuels. The other comment was sent on July 9, 2023, two days after publication, and questioned why the Public Notice did not run in the Ormond Beach Observer newspaper. Neither included a request for a hearing or a challenge to the air pollution controls established by the Permit. Neither comment was submitted by Petitioner.

31. A preponderance of the competent substantial evidence established that, with the exception of the facility address and proof of publication issues discussed herein, the Public Notice was in full compliance with the applicable provisions of rules 62-110.106(7) and 62-210.350, and was legally sufficient.

B. Project Location and Address

32. As set forth previously, Belvedere did not provide a street address in the Initial Application, but provided latitude/longitude coordinates, UTM coordinates, and nearby streets (Harmony Road), an area map, and a "Site Exhibit" depicting the location and layout of the proposed facility to establish its location.

33. On December 2, 2022, the Tax Collector for Volusia County issued its Notice of Ad Valorem Taxes and Non-Ad Valorem Assessments 2022 Paid Real Estate notice for the Property, which listed the address of the Property as "874 Hull Ave., Ormond Beach, 32174."

34. At some point in 2023, the Tax Collector for Volusia County issued its 2023 Notice of Proposed Property Taxes and Proposed or Adopted Non-Ad Valorem Assessments ("TRIM Notice") for the Property, which listed the address as "874 Hull Ave., Ormond Beach, 32174." Though the date of the TRIM Notice does not appear on the document, any challenge to the property value, classification, or exemption was due no later than September 15, 2023.

35. DEP used the UTM coordinates to locate the Property on the Volusia County Property Appraiser's website. On March 2, 2023, DEP employee Elizabeth Walker advised Mr. Costello and Mr. Read, among others, that "I was able to go to the Volusia County property appraiser website and get the address for the property according to the property appraiser. The road they said it was off of is Harmony Ave. The address is on Hull Ave." The email included an accurate map of the location of the Property, with the following:

ADDRFULL	874 HULL AVE
CITY	ORMOND BEACH
ZIP CODE	32174

Ms. Walker inquired further as to whether asking Belvedere about the address would be considered a Request for Additional Information.

36. On March 23, 2023, Belvedere's consultant confirmed to DEP that the address for the proposed facility was 874 Hull Avenue, Ormond Beach, Florida 32174. That address was consistent with the address on record with the Volusia County Property Appraiser and the Volusia County Tax Collector.

37. Prior to the June 20, 2023, release of the TEPD, Mr. Costello performed a Google search of "874 Hull Avenue, Ormond Beach," which produced two maps of the Property that he included in the TEPD. Although his search was for 874 Hull Avenue, the map itself labeled the "pinpoint" for the address as 874 Hull Road. A preponderance of the evidence establishes that for purposes of locating the Property, the terms "avenue" and "road"

could be used interchangeably to locate the same Property. The use of one term over the other would not direct a user to any parcel other than the Property.

38. On or about August 22, 2023, months after the Application was submitted, and well after the Public Notice was published, Chris Cromer, the Volusia County Growth and Resource Management Mapping and Addressing Manager, emailed the Volusia County Property Appraiser requesting that the address for the Property be updated to "874 HULL RD ORMOND BEACH 32174." The reason for the request was the discovery that, due to the combination of two adjacent parcels to create the Property, one (the "Active" parcel) was shown as 874 Hull Avenue, and one (the "Historic" parcel) was shown as 874 Hull Road. Other than its having occurred after the August 22, 2023, request, it is unclear when the change in the Volusia County records was accomplished.

39. Though the difference in the "avenue" and "road" designation apparently had some significance in Volusia County's internal subdivision, zoning, and site plan "AMANDA folders," there was no evidence that the difference led to any confusion on the part of the public generally, or Petitioner specifically.

40. On December 1, 2023, the Tax Collector for Volusia County issued its Notice of Ad Valorem Taxes and Non-Ad Valorem Assessments 2023 Paid Real Estate notice for the Property, which, for the first time, listed the address as "874 Hull Rd., Ormond Beach, 32174."

41. There was no competent substantial and persuasive evidence that Hull "Avenue" versus Hull "Road" caused any confusion in trying to locate the Property to any person generally, or to Petitioner specifically. Rather, a preponderance of the competent substantial evidence established that a

search of "874 Hull Avenue, Ormond Beach" would result in an accurate depiction of the Property.[2]

42. A preponderance of the competent, substantial, and persuasive evidence demonstrates that the 874 Hull Avenue address Belvedere provided to DEP in the Application was proper at the time the Application was submitted, and at the time the Public Notice was published, was not confusing or misleading, and was consistent with official records of Volusia County. That the address was "updated" more than a month after the permit was issued, or showed up differently on Google, does not alter or affect this finding.

Circulation of the Hometown News

43. All publication qualification requirements were stipulated to have been met, except for the issue of whether, as set forth in section 50.011(1)(c)1., the Hometown News:

> Has an audience consisting of at least 10 percent of the households in the county or municipality, as determined by the most recent decennial census, where the legal or public notice is being published or posted, by calculating the combination of the total of the number of print copies reflecting the day of highest print circulation ... as certified biennially by a certified independent third-party auditor, and the total number of online unique monthly visitors to the newspaper's website from within the state, as measured by industry-accepted website analytics software.

[2] Petitioner has, in its PRO, again delved into an issue — equitable tolling, i.e., whether it was misled or lulled into inaction by the incorrect address — that was neither pled nor preserved in the JPS. Petitioner's PRO, p. 17, fn. 11. (The footnote also, again, argued that "[p]ublishing the Public Notice outside of the legal advertisements section is also contrary to the Rule requirements," an unpled and unpreserved issue addressed previously.) The issue of equitable tolling was not tried by consent. Thus, it will not be considered here. Suffice it to say that Petitioner admitted that it did not see the Public Notice before Mr. McMullin was advised of the proposed facility at the barbershop on August 2, 2023, well after the time for filing a petition had passed. Thus, this case is simply an all-to-common example of a legal advertisement going unnoticed until it was too late.

44. The 2020 Census, which is the most recent decennial census, counted 232,301 households in Volusia County, 10 percent of which is equal to 23,230 households.

45. The Hometown News' print circulation totals are audited every two years by the Circulation Verification Council ("CVC"), a certified independent third-party auditor.

46. The CVC certified an average circulation for the Hometown News of 19,697 print copies circulated to businesses and homes throughout Volusia County.

47. Mr. Dougal testified that the Public Notice was published on July 7, 2023, online at hometownnewsvolusia.com.

48. Google Analytics, an industry accepted and reliable website analytics software service for calculating website visitor data, reported that hometownnewsvolusia.com had 38,237 online unique monthly visitors from Florida in July 2023. Data reported by Google Analytics indicated that online unique monthly visitors from Florida for previous months in 2023 were comparable, and never fell below 21,748 unique monthly Florida visitors.

49. Adding the 19,697 print circulation copies and the 38,237 unique online monthly website visitors from Florida, results in a total audience for the Public Notice of the Notice of Intent of 57,934, well in excess of the 23,230 households that constitute 10 percent of the households in Volusia County.

50. The Public Notice was also published on July 7, 2023, at the "floridapublicnotices.com" website. Though it seems intuitive that there would be additional unique monthly visitors to "floridapublicnotices.com," figures for that website were not provided. Given the findings as to circulation from the Hometown News and its hometownnewsvolusia.com website, further calculations of circulation are unnecessary.

51. A preponderance of the competent substantial evidence established that the Public Notice was published in a newspaper of general circulation

meeting the requirements of section 50.051, including having an audience consisting of at least 10 percent of the households in Volusia County.

Proof of Publication

52. Belvedere submitted a Proof of Publication Affidavit to DEP on July 13, 2023, executed by Heather Donaldson, a Hometown News Media Group representative.

53. The Proof of Publication was on a form normally used by Hometown News. The July 13, 2023, Proof of Publication did not use, verbatim, the language from section 50.051. Rather, it included a copy of the Notice, a statement that "[t]his will certify that the attached ad ran in the Hometown News Media Group issues of Ormond Beach 07/07/23," a signature of Ms. Donaldson and a notarization.

54. On November 2, 2023, Ms. Donaldson provided Belvedere with a second Hometown News Proof of Publication Affidavit which closely mirrored, and substantially complied with, section 50.051. The second Proof of Publication was provided to DEP.

55. On December 19, 2023, Mr. Dougal provided Belvedere with a third Hometown News Proof of Publication Affidavit. The third Proof of Publication included typed, rather than handwritten entries, but was otherwise substantively identical to and in compliance with section 50.051. The third Proof of Publication was provided to DEP.

56. Each of the three Proofs of Publication included a copy of the Public Notice which ran in the Hometown News on July 7, 2023.

57. Rule 62-110.106(9) provides, in pertinent part, that:

> (9) Proof of Publication. Notice to substantially affected persons on applications for Department permits or other authorizations is an essential and integral part of the state environmental permitting process. Therefore, no application for a permit or other authorization for which published notice is required shall be granted until proof of publication of notice is made by furnishing a uniform affidavit

> in substantially the form prescribed in Section 50.051 of the Florida Statutes, to the office of the Department issuing the permit or other authorization.

58. Rule 62-110.106(11) provides that "Failure to publish any notice of application, notice of intent to issue permit, or notice of agency action required by the Department shall be an independent basis for the denial of the permit or other pertinent approval or authorization." Rule 62-110.106(11) does not provide that the submission of an arguably deficient proof of publication to DEP "shall be an independent basis for the denial of the permit."

59. As established by rule 62-110.106(9), proof of publication is required by DEP to provide assurance *to DEP* that required notice has, in fact, been published, with the sanction being the delay or denial of the permit. The rule does not suggest that a deficiency in the form of a proof of publication for a Public Notice that was unquestionably published serves to alter or extend the time for a third party to file a petition, or establishes an independent basis for denial of a permit.

60. The filing of the proof of publication as occurred here did not adversely affect any rights or remedies available to Petitioner, and does not affect the fairness of this proceeding. This being a de novo proceeding, designed to formulate rather than review agency action, consideration of each of the proofs of publication, and the information available to DEP as to the proper publication of the Public Notice, is warranted.

61. The more salient point regarding the publication of notice *vis à vis* Petitioner is whether the Public Notice itself contained all the information required to provide a meaningful and complete point of entry to challenge the Permit, and the rights attendant thereto. The Public Notice did just that.

62. A preponderance of the competent substantial evidence established that the Proof of Publication provided by the Hometown News, as

supplemented, were legally sufficient and, given the de novo nature of this proceeding and their receipt by DEP prior to final agency action, timely received.

Notice of Application

63. Rule 62-110.106(6) provides, in pertinent part, that:

> (6) Notice of Application. Publication of a notice of application shall be required for those projects that, because of their size, potential effect on the environment or natural resources, controversial nature, or location, are reasonably expected by the Department to result in a heightened public concern or likelihood of request for administrative proceedings.

64. The decision to require a notice of application is based on DEP having a reasonable expectation, at the time the application is made, that the project lends itself to heightened public concern or likelihood of request for administrative proceedings. Since this case involves an air permit, the heightened public concern would logically relate to the proposed air emissions.

65. When DEP reviews a project to determine whether a notice of application is necessary, staff at multiple levels review the project and may raise concerns regarding the need for such a notice. Staff further reviews the project for recognized characteristics that would be expected to result in heightened public concern.

66. Here, the Application did not raise any initial concerns, as the permit was for a "minor source air construction permit." As stated by Mr. Read:

> Q. Was there anything about this project that raised concerns within the department that it might be of heightened interest to the public?
>
> A. Say no as a minor facility. The submissions were in the big scheme of things minor. No, we did not anticipate heightened public interest or controversy

> to be associated with this project when we received the application.

DEP did not expect the project to result in a heightened public concern or likelihood of request for administrative proceedings, had no indication of such when the Application was submitted, and concluded publication of a notice of application was not required. That expectation was, at the time, a reasonable conclusion.

67. Petitioner argues that the facility for which the air permit is being sought, being a petroleum product tank farm, should have triggered a determination of heightened public concern. There was nothing inherent in a tank farm next to a railroad and a paving company that caused concern to DEP. The real issue for DEP was the nature of the minor air permit at issue, and the air emissions authorized thereby.

68. Petitioner also argues that the receipt of two comments during the public comment period opened by the Public Notice demonstrated that the project was controversial. First, the two public comments were received after the issuance of the Written Notice of Intent to Issue Air Permit and publication of the Public Notice, long after the time for publishing a notice of application had passed. One was a philosophical text on the wisdom of fossil fuel use; the other questioned why the Public Notice was not published in a different newspaper. Neither comment was directed at the size of or emissions from the facility, and neither reasonably suggest that the project lends itself to heightened public concern or likelihood of request for administrative proceedings.[3]

69. Finally, Petitioner introduced resolutions from a number of Volusia County municipalities opposed to the Permit, all of which were adopted long

[3] One might conclude that if this case was of heightened public concern, it would have generated more than a single challenge from a single adjacent property owner. However, the issue is not whether the project is *now* believed to be of heightened public concern, but whether when the Application was received, DEP reasonably believed it would be of heightened public concern.

after the time for filing public comments or challenging the Permit had passed — the earliest being adopted on September 20, 2023 — and after Petitioner had filed its First Petition. None of the local governments sought to intervene in this proceeding.

70. Evidence of public concern provided after the issuance of the Permit is not evidence that DEP should have known of those concerns at the time the Application was submitted. To retroactively infer knowledge of public concern sufficient to require publication of a notice of application based on expressions of concern made long after an application is filed and proposed agency action has been issued and published is simply not consistent with rule 62-110.106(6).

71. This is not a case in which DEP had notice of a project's heightened public concern and either minimized or ignored that information. Here, Petitioner suggests that, despite no indication of such, DEP should have predicted heightened public concern and required Belvedere to publish a notice of application. The evidence does not support that position.

72. DEP's determination that a notice of application was not required for the minor air source construction permit did not adversely affect any rights or remedies available to Petitioner to challenge the Permit, and did not affect the fairness of this proceeding.

73. Petitioner offered no persuasive evidence to establish that, at the time the Application was submitted, DEP had any reason to believe the Project would require publication of a notice of application. A preponderance of the competent substantial and persuasive evidence established that DEP's conclusion was reasonable under the circumstances and the nature of the Permit.

Timeliness of the Petition

74. Rule 62-110.106(2) provides, in pertinent part, that:

> (2) "Receipt of Notice of Agency Action" Defined. As an exception to subsection 28-106.111(2), F.A.C.,

> for the purpose of determining the time for filing a petition for hearing on any actual or proposed action of the Department as set forth below in this rule, "receipt of notice of agency action" means either receipt of written notice or publication of the notice in a newspaper of general circulation in the county or counties in which the activity is to take place, whichever first occurs ....

75. Rule 62-110.106(3) provides, in pertinent part, that:

> (3) Time for Filing Petition.
>
> (a) A petition shall be in the form required by Rule 28-106.201 or 28-106.301, F.A.C., and must be filed (received) in the office of General Counsel of the Department within the following number of days after receipt of notice of agency action, as defined in subsection (2), of this rule above:
>
> 1. Petitions concerning Department action or proposed action on applications for permits under Chapter 403, F.S., and related authorizations under Section 373.427, F.S., (except permits for hazardous waste facilities): fourteen days.

76. The Public Notice was published on July 7, 2023.

77. The 14th day after publication of the Public Notice fell on July 21, 2023.

78. The First Petition was filed on August 15, 2023.

79. Given the findings of fact as to the issues set forth above, the First Petition was not filed within the time period established in rule 62-110.106(3), and was, therefore, untimely.

CONCLUSIONS OF LAW

Jurisdiction

80. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

Burden of Proof

81. Section 120.569(2)(p), Florida Statutes, provides that:

> For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the permit, license, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence.

82. Respondent made its prima facie case of entitlement to the Permit by entering into evidence the complete Application files and supporting documentation, the Written Notice of Intent to Issue Air Permit, the published Public Notice, and the Permit. With Respondent having made its prima facie case, the burden of ultimate persuasion is on Petitioner to prove its case in opposition to the Permit by a preponderance of the competent and substantial evidence.

83. Even without the burden shifting provisions of section 120.569(2)(p), Petitioner has the burden of proving that the Petition for Formal Proceedings was timely filed since its timeliness has been challenged. *Conservation Alliance of St. Lucie Cnty., Inc. v. Ft. Pierce Util. Auth. and Dep't of Env't Prot.*, Case No. 09-1588 (Fla. DOAH May 24, 2013; Fla. DEP July 9, 2013);

Potter v. Dep't of Env't Prot., Case No. 10-9417 (Fla. DOAH Oct. 14, 2011; Fla. DEP Jan 4, 2012); *Hasselback v. Dep't of Env't Prot.*, Case No. 07-5216 (Fla. DOAH Jan. 28, 2010; Fla. DEP Mar. 12, 2010), *rev'd. on other grounds, Hasselback v. Dep't of Env't Prot.*, 54 So. 3d 637 (Fla. 1st DCA 2011).

84. The practical effect of the application of section 120.569(2)(p) is that the Permit file:

> may be received into evidence for the truth of the matters asserted in them, without being subject to hearsay objections. If these documents could not be admitted except through witnesses with personal knowledge and requisite expertise as to all statements contained within the documents, one of the primary purposes of the statute would be destroyed.
>
> * * *
>
> 94. When the applicant had the burden of persuasion, it made sense to require the applicant to prove with normal formalities the contested aspects of the permit application. Now that section 120.569(2)(p) places the burden on the challenger in cases where the agency intends to issue the permit, there is no longer a reason to differentiate between the quality of proof required for the uncontroverted and the contested aspects of the permit application. It is consistent with the reasoning in [*Florida Department of Transportation v. J.W.C. Company, Inc.*, 396 So. 2d 778 (Fla. 1st DCA 1981)] that all aspects of the applicant's prima facie case of entitlement to the permit should now be subject to less formal proof through the admission into evidence of the permit application and supporting material.

Last Stand, Inc., and George Halloran v. Fury Mgmt., Inc., and Dep't of Env't Prot., DOAH Case No. 12-2574, RO ¶¶ 91, 94 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013).

85. This is a de novo proceeding, pursuant to section 120.57, intended to formulate final agency action rather than to review the Department's decision to issue the Permit, and the preliminary agency action is not entitled to a presumption of correctness. § 120.57(1)(k), Fla. Stat.; *see also Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 785 (Fla. 1st DCA 1981) (quoting *McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977)); *Capeletti Bros. v. Dep't of Gen. Servs.*, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). In addition, interpretation of a statute or rule in an administrative proceeding is de novo. Art. V, § 21, Fla. Const.; s*ee also Kanter Real Est., LLC v. Dep't of Env't Prot.*, 267 So. 3d 483, 487 (Fla. 1st DCA 2019).

86. The standard of proof is the preponderance of the competent, substantial evidence. § 120.57(1)(j), Fla. Stat.

Analysis

87. Section 120.569(1) states, in pertinent part, that:

> Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review; and shall state the time limits which apply.

88. Pursuant to chapter 120, persons affected by agency action must be given a "clear point of entry" to challenge that action. In that regard:

> an agency's rules must clearly signal when the agency's free-form decisional process is completed or at a point when it is appropriate for an affected party to request formal proceedings. ... In other words, an agency must grant affected parties a clear point of entry, within a specified time after some recognizable intended agency action to formal or informal administrative proceedings.

Capeletti Bros. v. Dep't of Transp., 362 So. 2d 346, 348 (Fla. 1st DCA 1978).

89. Rule 62-110.106, entitled Decisions Determining Substantial Interests, provides, in pertinent part, as follows:

> (2) "Receipt of Notice of Agency Action" Defined. As an exception to subsection 28-106.111(2), F.A.C., for the purpose of determining the time for filing a petition for hearing on any actual or proposed action of the Department as set forth below in this rule, "receipt of notice of agency action" means either receipt of written notice or publication of the notice in a newspaper of general circulation in the county or counties in which the activity is to take place, whichever first occurs, except for persons entitled to written notice personally or by mail under Section 120.60(3), Florida Statutes, or any other statute.
>
> * * *
>
> (3) Time for Filing Petition.
>
> (a) A petition shall be in the form required by Rule 28-106.201 or 28-106.301, F.A.C., and must be filed (received) in the office of General Counsel of the Department within the following number of days after receipt of notice of agency action, as defined in subsection (2) of this rule above:
>
> 1. Petitions concerning Department action or proposed action on applications for permits under Chapter 403, Florida Statutes, and related authorizations under Section 373.427, Florida Statutes, (except permits for hazardous waste facilities): fourteen days;

90. The Public Notice for the Permit was published in the Hometown News on July 7, 2023. That notice established a clear point of entry that met the requirements of rule 62-110.106.

91. The Petition for Formal Proceeding was initially filed on August 15, 2023, well after the July 21, 2023, deadline established by the notice.

92. As established in the findings of fact herein, the Public Notice was not deficient in any manner that would cause it to be ineffective to establish a deadline for filing the Petition.

Legal Requirements of the Public Notice

93. A preponderance of the competent, substantial, and persuasive evidence established that the Public Notice was legally sufficient and met the requirements of rules 62-110.106(7) and 62-210.350.

Project Location and Address

94. A preponderance of the competent, substantial, and persuasive evidence established that the Public Notice provided an accurate and correct address for the Property and proposed facility, which was that used by the Volusia County Property Appraiser and the Volusia County Tax Collector. Furthermore, even if an address other than 874 Hull Avenue, Ormond Beach, Florida 32174, i.e., 874 Hull Road, was used to search for the Property, the use of either address would direct one to the correct Property. Thus, whether the Property should be listed as 874 Hull Avenue or 874 Hull Road is not an issue that could reasonably result in a conclusion that either the Application or the Public Notice is misleading or confusing.

Circulation of the Hometown News

95. A preponderance of the competent, substantial, and persuasive evidence established that the Hometown News:

> Has an audience consisting of at least 10 percent of the households in the county or municipality, as determined by the most recent decennial census, where the legal or public notice is being published or posted, by calculating the combination of the total of the number of print copies reflecting the day of highest print circulation, ... as certified biennially by a certified independent third-party auditor, and the total number of online unique monthly visitors to the newspaper's website from within the state, as measured by industry-accepted website analytics software.

Thus, the Hometown News meets the circulation threshold of section 50.011(1)(a)1.

Notice of Application

96. A preponderance of the competent, substantial, and persuasive evidence established that DEP made a correct determination, based on the information available at the time the Application was filed, that Belvedere was not required to publish a notice of application pursuant to rule 62-110-106(6).

Proof of Publication

97. A preponderance of the competent, substantial, and persuasive evidence established that the proofs of publication Belvedere provided to the Department were legally sufficient and, given the de novo nature of this proceeding and their receipt by DEP prior to final agency action, timely received.

98. There is little case law construing the effect on the petition rights of a third party of a proof of publication that does not track section 50.051 but which, as here, provides general notice to DEP of publication. However, the undersigned agrees with, and adopts, the following analysis of the issue provided by Administrative Law Judge P. Michael Ruff:

> ... the purpose of requiring an applicant to publish notice of agency action is to give substantially affected persons an opportunity to participate in an administrative proceeding. See Section 403.815, Florida Statutes, and Rule 17-103.150(4), Florida Administrative Code. Consequently, the crucial element in the Department's publication requirement is that the notice be published to trigger the commencement of the time for affected persons to request a hearing. The requirement that proof of publication be provided to the Department does nothing to affect the rights of third parties, but merely is a technical requirement which allows the Department to determine whether a third party has timely exercised its rights to contest a published notice of intended agency action. If an

> applicant publishes notice of intended agency action, but fails to timely provide the Department with proof of that publication, the deficiency is one which is easily cured. No harm will occur because the permit will not be issued until proof of publication is received by the Department, in any event, because of Rule 17-103.510(4), Florida Administrative Code.

Bio-Tech Tracking Sys., Inc. v. Dep't of Env't Regul., Case No. 90-7760, ¶32 (Fla. DOAH Apr. 3, 1991; Fla. DER May 17, 1991).[4]

99. Furthermore, even if the notice were deficient for reasons that were not material, e.g., because proof of publication was corrected to meet the section 50.051 form, the published Public Notice conveyed the information required to establish a clear point of entry to challenge the Permit. As stated in Judge Ervin's concurring opinion:

> I consider the essential facts in the present case to be practically on all fours with those in *Lamar Advertising Co. v. Department of Transportation*, 523 So. 2d 712 (Fla. 1st DCA 1988), wherein this court held that although the agency's notice denying a sign permit did not track the precise language in the department's rule concerning such denials, the notice "clearly informed appellant that the application had been denied and that appellant had the right to request a 120.57 hearing within 30 days of the date of the notice." *Id.* at 713. We thereupon concluded that the applicant had been provided a clear point of entry to administrative review, which had been waived by its noncompliance with the limitation period stated in the notice.

[4] Though, as noted by Petitioner, section 50.051 has been amended regarding the contents of a proof of publication since the entry of the *Bio-Tech* Final Order, the determination that a proof of publication does not affect the rights of third parties remains applicable. The proof of publication is a matter between an applicant and DEP. Third-party rights are subject to, and protected by, the published Public Notice. Here, the Public Notice was published. Thus, Petitioner's rights to challenge the Permit were fully preserved, if not exercised.

Env't Res. Assocs. v. State, Dep't of Gen. Servs., 624 So. 2d 330, 331-332 (Fla. 1st DCA 1993).

Timeliness of the Petition

100. The Public Notice having been published on July 7, 2023, the deadline for filing a petition was July 21, 2023. Based on the foregoing, the Petition for Administrative Hearing filed on August 15, 2023, and its subsequent amendments, were untimely.

Conclusion

101. A preponderance of the competent, substantial, and persuasive evidence established that the deficiencies in the Public Notice alleged by Petitioner were not proven, and were not sufficient to invalidate the clear point of entry, or to alter the time to bring a challenge to the Permit.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED that Respondent, Department of Environmental Protection, enter a final order dismissing the Petition for Administrative Hearing filed on August 15, 2023, and its subsequent amendments challenging air pollution construction Permit No. 1270233-001-AC.

DONE AND ENTERED this 5th day of March, 2024, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.