

Kanter Real Estate, LLC v. Dep't of Env'tl. Prot., No. 1D17-5096, 2019 WL 1250533
(Fla. 1st DCA Mar. 19, 2019)

Permit Applicants May Need to Reevaluate Strategies Following New Constitutional Amendment Prohibiting Agency Deference

In *Kanter Real Estate, LLC v. Department of Environmental Protection*, the First District Court of Appeal (First DCA) held that the Florida Department of Environmental Protection (“FDEP”) incorrectly interpreted the multi-factor balancing test under Section 377.241, Florida Statutes, and improperly rejected an administrative law judge’s (“ALJ’s”) factual findings in favor of granting an oil and gas permit. Kanter Real Estate, LLC (“Kanter”), which owns the surface rights of a 20,000 acre property (“the Property”) in Broward County, Florida, challenged FDEP’s Final Order denying an exploratory oil well drilling permit in an “environmentally degraded” part of the Florida Everglades.

In its opinion, the First DCA discussed multiple procedural concerns with appellate review of an agency or ALJ’s decision. The court first discussed appellate review of factual findings. Factual findings are case-by-case determinations of the facts. Agencies must accept an ALJ’s factual findings unless they are unsupported by competent, substantial evidence. The court also discussed the level of deference accorded to an agency’s legal conclusions in an appellate court. Legal conclusions are conclusions interpreting a statute, law, rule, or regulation. The standard for accepting an agency’s legal conclusions changed significantly after Amendment Six, a 2018 Amendment to the Florida Constitution. Before Amendment Six, appellate courts afforded significant deference to agency interpretations of statutes and rules. Today, appellate courts cannot defer to an agency’s statutory interpretation and instead must independently come to its own legal conclusions.

The First DCA applied those procedural considerations to determine whether FDEP’s denial of an oil and gas permit under Section 377.241, Florida Statutes, was correct. Section 377.241, F.S., provides a multi-factor test to determine whether or not to approve an oil and gas permit. The factors balance environmental interests against the right to explore for oil. The first factor—the nature, character, and location of the lands involved—weighed against issuing the permit according to FDEP because the project was in the Florida Everglades. The court however found the ALJ’s findings were improperly reversed by FDEP and found in favor of issuing the permit on this factor. The ALJ and FDEP interpreted the intent of the second statutory factor—the nature of ownership, including delay in exercising rights of ownership—differently, prompting FDEP to arrive at a different legal conclusion than the ALJ. The court ultimately held in favor of Kanter, finding that the delay in applying for the permit should not count against them.

FDEP accepted the ALJ’s factual findings regarding the third statutory factor—the likelihood of discovering oil in profitable quantities—constituting no reversible error. Ultimately, the court directed FDEP to grant Kanter’s permit application.