

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUWANNEE RIVER WATER)	
MANAGEMENT DISTRICT,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 88-1445
)	
NORMAN LEONARD,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to written notice, a formal hearing was held in this case before William R. Cave, Hearing Officer, Division of Administrative Hearings, on October 9, 1988, in Live Oak, Florida. The issue for determination is whether the Respondent, Norman Leonard is engaged in the occupation of agriculture or silviculture and, if so, was the alteration of the topography of that certain land owned by him in Madison County, Florida, consistent with the practice of such occupations and not for the sole or predominant purpose of impounding or obstructing the surface water.

APPEARANCES

For Petitioner: Janice F. Baker, Esquire
Post Office Box 1029
Lake City, Florida 32056-1029

For Respondent: Norman Leonard, Pro Se
Route 2, Box 172-D
Live Oak, Florida 32060

BACKGROUND

By an Administrative Complaint And Order dated January 29, 1988, Petitioner charges Respondent with violating Chapter 473, Florida Statutes and Chapter 40B-4, Florida Administrative Code, and alleges that Respondent has substantially improved or constructed a road involving the clearing, excavating and filling of wetlands without the required permit. Petitioner seeks to have Respondent return the altered topography of such land to its pre-development grade by backfilling ditches, removing fill material from a roadbed and revegetating to prevent erosion.

In support of its charges, Petitioner presented the testimony of Dennis Price. Petitioner's exhibits 1, 2, 3 and 4 were received into evidence. Respondent testified in his own behalf and presented the testimony of John Bottcher and Randall Leonard. Respondent's exhibits 1, 2 and 3 were received into evidence.

The parties submitted posthearing Proposed Findings of Fact and Conclusions of Law. A ruling on each proposed finding of fact has been made as reflected in the Appendix to this Recommended Order.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant facts are found:

1. Respondent owns real property located in Township 2 North, Range 7 East, Section 32, in Madison County, Florida, that has surface water flowing through it and is encompassed within what is defined as "wetlands."

2. Respondent is in control and possession of the property in question and all work on the property that is material to this proceeding is under the control or direction of the Respondent.

3. There were access roads on the property as early as 1973 as reflected by Respondent's exhibit 2, a 1973 aerial photograph, but the width of the roads or the existence of ditches or culverts cannot be determined from the photograph.

4. Petitioner's exhibit 2, a 1981 aerial photograph, shows the roads still in existence in 1981 but the width of the roads or existence of ditches or culverts cannot be determined from the photograph.

5. Sometime before the Respondent purchased the property and began construction to expand the roads, ditches and culverts were in place; however, there was no evidence as to when the ditches and culverts came to be in place.

6. A 1976 survey of the property reflects 60 foot roads which were to provide access to platted but unrecorded lots. These roads had not been constructed when Respondent purchased the property or began construction to expand the roads.

7. The newly constructed portions of the road indicates an attempt to build the roads in accordance with the 1976 survey.

8. The previously existing roads attempted to follow the natural contour of the land and as a result were not always straight, and only had a negligible effect on the flow or storage of surface water in regard to the property.

9. Sometime around October 1987, Respondent began to rebuild and construct roads on the property by straightening existing curves, removing fill material from adjacent wetlands to widen and heighten the existing roadbed or construct a new roadbed, and to increase the depth and width of existing ditches or dig new ditches.

10. The initial portion of the existing road providing access to the property from the county graded road has been substantially rebuilt with portion of the roadbed being 40 to 43 feet wide. Ditches along this portion of the roadbed have had their width increased up to 14 feet and their depth increased up to 6 and 8 feet.

11. Other portions of the road has been expanded beyond the previously existing roadbed by increasing the width and height of the roadbed.

12. The increased size of the ditches and the expanded roadbed has increased the interception of surface water above that already being intercepted by the previous roadbed and ditches and, as a result, there is an increased amount of surface water impounded or obstructed. The effect is that surface water is removed from Respondent's property at a faster rate than before road construction began and, as a result, sheet flow of surface water is decreased which diminishes the storage of surface water on the property.

13. Although new culverts were installed during road construction, there was insufficient evidence to show that these new culverts were in addition to the culverts already in place or if they replaced old culverts. There was insufficient evidence to show that the new culverts allowed water to flow in a different direction or be removed from the property at a faster rate than before or if they impounded or obstructed surface water more so than before.

14. The previously existing roads had sufficiently served an earlier timber harvest on the property and, by Respondent's own testimony, were sufficient for his ongoing hog and goat operation.

15. The extensive rebuilding and constructing of roads in this case was neither necessary nor a customary practice for construction of farm access roads in this area.

16. Respondent is engaged in the occupation of agriculture in that he has a bona fide hog and goat operation. However, Respondent's silviculture occupation is somewhat limited in that he is presently harvesting the timber but shows no indication of replanting or continuing the forestry operation upon completing the present harvesting operation.

17. The extensive rebuilding and constructing of roads in this case goes beyond what is necessary or is the customary practice in the area for a hog or goat operation or forestry operation such as Respondent's and is inconsistent with this type of agriculture or silviculture occupation.

18. Respondent has never applied for nor received a surface water management permit from the Petitioner even though the Petitioner has informed Respondent that a permit was required for the work being done on his property.

19. The present alteration of the topography of the land by Respondent has obstructed and impounded surface water in such a fashion that the interruption of the sheet flow of surface water has been increased, causing the storage of surface water on the property to be diminished.

20. At the present time, Respondent has been enjoined by the Circuit Court of Madison County, Florida, from any further activity on this project. However, should Respondent be allowed to complete this project, it is evident that the sole and predominant purpose would be to impound and obstruct the sheet flow of surface water and diminish the storage of surface water on the property in question.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of this proceeding pursuant to Section 120.57(1), Florida Statutes.

22. Since Respondent is engaged in the occupation of agriculture and silviculture, his alteration of the topography of the lands in question would be exempt from the permitting requirement of Section 373.413, Florida Statutes, and Rule 40B-4.1040, Florida Administrative Code, if such alteration is for purposes consistent with the practice of his agriculture and silviculture occupation, provided the alteration is not for the sole or predominant purpose of impounding or obstructing surface water. Section 373.406(2), Florida Statutes, and Rule 40B-4.1070, Florida Administrative Code.

23. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (2 DCA Fla. 1981). The Petitioner has met its burden of proof by showing that the Respondent violated Chapter 373, Florida Statutes, by altering the topography of his land for purposes that are not consistent with the practice of agriculture or silviculture, and that the sole or predominant purpose of such alteration was to impound or obstruct the surface water entering and leaving the property and has a substantial and adverse effect on the surrounding wetlands.

24. Section 373.119, Florida Statutes, empowers the Respondent to administratively enforce its final orders, including the necessary corrective action to be taken, when there has been a violation of Chapter 373, Florida Statutes, or the rules promulgated thereunder.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record and the candor and demeanor of the witnesses, it is, therefore,

RECOMMENDED that the Petitioner, Suwannee River Management District, enter a Final Order requiring Respondent, Norman Leonard, to: (a) remove all unauthorized fill material placed within jurisdictional wetlands and return those areas to predevelopment grades and revegetate with naturally occurring local wetlands species to prevent erosion; (b) back fill excavated swale ditches, return road beds and excavated ditches to predevelopment condition and grades and seed disturbed non-wetland areas with a 50:50 mix of bahia and rye grass and; (c) refrain from any other development until and unless a required permit is obtained for such development.

Respectfully submitted and entered this 13th day of February, 1989, in Tallahassee, Leon County, Florida.

WILLIAM R. CAVE
Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of February, 1989.

APPENDIX TO RECOMMENDED ORDER
IN CASE NO. 88-1445

The following constitutes my specific rulings pursuant to Section 120.59(2), Florida Statutes, on all of the Proposed Findings of Fact submitted by the parties in this case.

Specific Rulings on Proposed Findings of Fact
Submitted by Petitioner

1. Adopted in Finding of Fact 1.
- 2.-3. Adopted in Finding of Fact 2.
- 4.-7. Are unnecessary findings for this Recommended Order.
8. Adopted in Finding of Fact 18.
9. Adopted in Finding of Fact 19.
10. Adopted in Finding of Fact 10.
11. Adopted in Finding of Fact 11.
12. Subordinate to the facts actually found in this Recommended Order.
13. Adopted in Finding of Fact 11.
14. Adopted in Finding of Fact 12.
15. Rejected as conclusions of law.
16. Adopted in Findings of Fact 3 and 4.
17. Adopted in Finding of Fact 8.
18. Adopted in Finding of Fact 9.
19. Adopted in Finding of Fact 9.
20. Adopted in Finding of Fact 8.
21. Adopted in Finding of Fact 6.
22. Adopted in Finding of Fact 7.
23. Adopted in Finding of Fact 6.
24. Adopted in Finding of Fact 10.
25. Adopted in Findings of Fact 15 and 17.
- 26.-29. Adopted in Finding of Fact 12.
30. Adopted in Finding of Fact 13.
- 31.-32. Subordinate to facts actually found in this Recommended Order.
33. Adopted in Finding of Fact 12.
34. Adopted in Finding of Fact 16.
- 35.-38. Subordinate to facts actually found in this Recommended Order.
- 39.-42. Rejected as not being relevant or material.

Specific Rulings on Proposed Findings of Fact
Submitted by Respondent

1. The first paragraph adopted in Finding of Fact 16. The balance is rejected as a conclusion of law.
- 2.-3. Rejected as not being relevant or material.
4. Not a finding of fact but a statement of testimony. However, it is subordinate to facts actually found in this Recommended Order.
5. Rejected as not supported by substantial competent evidence in the record. The more credible evidence is contrary to this finding.

COPIES FURNISHED:

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