

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CANOE CREEK PROPERTY OWNERS)
ASSOCIATION, ET AL.,)
)
Petitioners,)
)
vs.) CASE NO. 89-2197
)
WESTWOOD COUNTRY ESTATES)
and SOUTH FLORIDA WATER)
MANAGEMENT DISTRICT,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Claude B. Arrington, held a formal hearing in the above-styled case on August 1-4, 1989, in Stuart, Florida.

APPEARANCES

For Petitioners: Don Mooers, Esquire
Qualified Representative
Post Office Box 1147
Palm City, Florida 34990

David J. Chestnut, Esquire
215 South Federal Highway
Stuart, Florida 34994

For Respondent, Terry E. Lewis, Esquire
Westwood Country Steve Lewis, Esquire
Estates: Messer, Vickers, Caparello,
French & Madsden, P.A.
2000 Palm Beach Lakes Boulevard, Suite 301
West Palm Beach, Florida 33409

For Respondent, John J. Fumero, Esquire
South Florida South Florida Water Management District
Water Management Post Office Box 24680
District: West Palm Beach, Florida 33416-4680

STATEMENT OF THE ISSUES

Whether Respondent, Westwood Country Estates, Inc.'s, application to modify surface water management Permit 43-00155-S should be granted.

PRELIMINARY STATEMENT

This proceeding began on October 14, 1988, when Westwood Country Estates, Inc. (Applicant), filed an application with South Florida Water Management District (SFWMD) for the modification of Permit No. 43-00155-S, a surface water management permit that had been issued by SFWMD in 1980.

Applicant is the owner of Westwood Country Estates (Westwood), a proposed 82.1 acre residential development in northwest Martin County, Florida. Permit No. 43-00155-S is the existing surface water management permit for Westwood.

Canoe Creek subdivision is an existing 85.6 acre residential subdivision located east to and adjacent to Westwood. Petitioners, who object to the modification to the Westwood permit, are the Canoe Creek Property Owners Association and individual property owners in the Canoe Creek subdivision. Permit No. 43-00135-S issued by SFWMD in 1979 and modified in 1981, is the existing surface water management permit for the Canoe Creek subdivision.

In 1979, the developers of Canoe Creek subdivision granted a drainage easement to the owners of the Westwood property from the common boundary of the two properties, through a swale, and into the Canoe Creek subdivision drainage system. Since 1980, Permit No. 43-00155-S has authorized the discharge of Westwood's surface water drainage into Canoe Creek subdivision's surface water management system.

Applicant seeks to modify Permit No. 43-00155-S by (1) increasing the off-site tributary area which drains on to Westwood from 4 acres to 56 acres, (2) raising the catch basin which receives the flow from the off-site area on to Westwood by six inches, and (3) lowering the structure which regulates flow from Westwood to the Canoe Creek surface water management system by three-tenths of one foot. The application was supported by an analysis which detailed several deficiencies in the surface water management system permitted for Canoe Creek by Permit 43-00135-S and which recommended certain improvements or repairs to the Canoe Creek subdivision surface water management system.

On March 24, 1989, the SFWMD staff filed a report which recommended approval of the modification application subject to certain specified conditions. Included among the special requirements for approval of the modifications requested by Westwood was the condition that the improvements to the Canoe Creek surface water management system recommended by Applicant be implemented. These improvements, consisting of the regrading of existing swales and the repair or replacement of culverts and weirs, will require a separate modification to Permit 43-00135-S.

After the favorable staff report was made, Petitioners objected to the granting of the modifications to Permit 43-00155-S and requested a formal administrative hearing. This proceeding followed.

At the formal hearing, Petitioners were represented by their qualified representative, Don Mooers, an attorney who is not a member of the Florida Bar, and by David Chestnut, a member of the Florida Bar who had been retained to assist Mr. Mooers with procedural matters.

At the formal hearing, Applicant presented the testimony of three witnesses, Howard Searcy, Richard Bouchard, and Ross McWilliams. Mr. Searcy, a professional engineer, prepared the application for modification and was accepted as an expert in civil engineering, hydrology, and water management

permitting. Mr. Bouchard, the supervising engineer with SFWMD who processed the modification application, was accepted as an expert in surface water management regulation and soil and water engineering as it relates to drainage and site plan development. Mr. McWilliams was accepted as an expert in biology and water quality. Applicant introduced 11 documentary exhibits, all of which were accepted into evidence. SFWMD presented no witnesses and no documentary evidence. Petitioners presented the testimony of two witnesses, Francisco Perez and T. Robert Valliant. Mr. Perez is an environmental specialist with the Florida Department of Environmental Regulation and was accepted as an expert in compliance and enforcement of DER potable water rules and regulations. Mr. Valliant is a resident of Canoe Creek subdivision and an individual Petitioner to these proceedings. Petitioners offered 15 documentary exhibits into evidence at the hearing, all of which were accepted into evidence. A sixteenth exhibit, identified as Petitioners' Exhibit 2, was to be filed as a late-filed exhibit, but it was subsequently withdrawn by Petitioners. At the parties' request, official recognition was taken of the applicable statutes and regulations relating to surface water management permitting.

A transcript of the proceedings has been filed. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. Consequently, the parties waived the requirement that a recommended order be rendered within thirty days after the transcript is filed. Rule 221-6.6031, Florida Administrative Code. Rulings on the proposed findings of fact submitted on behalf of Applicant and on behalf of SFWMD are found in the appendix to this Recommended Order. Petitioners did not file any proposed findings of fact within the deadline established for the filing of post-hearing submittals even though this deadline was extended on Petitioners' motion.

FINDINGS OF FACT

1. All lands pertinent to this proceeding are located in northwestern Martin County, Florida, within the jurisdiction of the South Florida Water Management District (SFWMD).

2. Respondent, Westwood Country Estates, Inc. (Applicant), is the owner of 82.1 acres of land that it proposes to develop into a residential subdivision known as Westwood Country Estates (Westwood). Westwood is adjacent to and west of Canoe Creek subdivision, an existing residential single family subdivision consisting of 85.6 acres.

3. The lands constituting Westwood and Canoe Creek subdivision historically drain in an easterly to southeasterly direction into Bessey Creek and from Bessey Creek into a major drainage canal maintained by SFWMD referred to as C-23. The primary drainage for Westwood has historically been across the lands constituting the Canoe Creek subdivision.

4. Petitioners are the Canoe Creek Property Owners Association, Inc., and individual property owners in the Canoe Creek subdivision. The primary grounds for their objections to the modifications are their contentions that the Westwood modifications would overload the Canoe Creek surface water management system, thereby flooding streets and homes, damaging septic tanks, and polluting the wells that serve Canoe Creek subdivision. Petitioners also object to the repairs and improvements to the Canoe Creek surface water, management system that are recommended by Applicant and are incorporated as special conditions to the application.

5. Permit No. 43-00135-S, issued by SFWMD in 1979, as modified by SFWMD in 1981, is the surface water management permit for Canoe Creek subdivision. The surface water management system for Canoe Creek subdivision consists of drainage swales, a detention pond, culverts, and weirs. From the detention pond, surface water drains via grassy swales easterly to a roadside ditch at Murphy Road, then southerly parallel to Murphy Road into Bessey Creek, which drains into the C-23 canal. Outfall for the Canoe Creek system is authorized at the rate of 21 cubic feet per second during the applicable 10-year, 3-day design storm.

6. A perpetual easement for utility and drainage purposes was granted on December 17, 1979, by the owner of the real property that was developed as the Canoe Creek subdivision, for itself and for its successors and assigns, to the then owners of the Westwood property, its successors and assigns. This easement, which is 20 feet in width and 485 feet in length, authorizes the drainage of water from Westwood into the Canoe Creek surface water management system. On the common boundary between Canoe Creek subdivision and Westwood there is a v-notch weir structure which is designed to regulate the outfall from Westwood to the Canoe Creek system. From that weir structure, the drainage easement runs easterly to what was in 1979 the Canoe Creek subdivision area perimeter ditch and to what is now the Canoe Creek subdivision retention lake. This grant of easement was recorded in the public records of Martin County, Florida, on December 17, 1979, in Official Records Book 485, pages 2163-2165.

7. On February 14, 1980, Permit 43-00155-S, a construction and operation surface water management permit was issued by SFWMD to the owners of Westwood. The permitted surface water management system for Westwood consists of wetlands areas, detention areas, drainage swales, culverts, and weirs. Outfall from the Westwood system is authorized at the rate of 21 cubic feet per second during the applicable 10-year, 3-day, design storm event. The outfall flows through the weir structure on the boundary between Westwood and Canoe Creek subdivision, through the drainage easement, into the Canoe Creek detention pond, and through the Canoe Creek surface water management system. Ultimate outfall for both the Westwood system and the Canoe Creek system is through Bessey Creek and the C-23 canal. Modifications to Permit 43-00155-S in 1982 and in 1983 did not alter Westwood's basic surface water management system. Since 1980, the surface water management system permitted for Westwood has contemplated that the surface water outflow would be discharged through the Canoe Creek subdivision surface water management system and that these surface water management systems be an integrated system consisting of detention ponds, drainage swales, culverts, and weirs, with outfall into Bessey Creek and then into the C-23 Canal.

8. In August 1988, an unauthorized water discharge occurred from the Westwood properties during a heavy storm before the completion of the Westwood surface water management system. This unauthorized discharge of water occurred through a breach in the partially completed dike located at the southern perimeter of Westwood. The breach in the dike on the southern perimeter was caused, in part, because Westwood was receiving an unauthorized discharge of water from a 56 acre parcel which adjoins Westwood on its western boundary. This unauthorized discharge onto Westwood was through a separate breach in the western perimeter dike. The Notice of Violation, which was issued by SFWMD to Applicant following this unauthorized discharge, precipitated the application which is the subject of this proceeding. Since the unauthorized discharge, the construction of Westwood's surface water management system has been completed. The perimeter of Westwood has been bermed to prevent unauthorized discharges from the off-site area.

9. On October 14, 1988, Applicant, pursuant to Chapter 373, Part IV, Florida Statutes, and the applicable rules found in Chapter 40E-4, Florida Administrative Code, applied for the modification to Permit 43-00155-S that is the subject of this proceeding. Howard Searcy, Westwood's consulting engineer, determined that approximately 56 acres of off-site property to the west of Westwood was draining onto Westwood and that provision should be made for this off-site area in Westwood's surface water management system. The modification process was necessary because the existing permit authorized drainage onto Westwood from only four of the 56 acres. As permitted by the rules and practice of SFWMD, the application for modification was submitted in the form of a letter.

10. The application requested the following modifications to Permit 43-00155-S:

A. That the tributary off-site area be increased from 4 acres to 56 acres;

B. That catch basin 23, which receives the off-site flow from the adjoining off-site 56 acres, be raised from elevation 12.0 feet NGVD to elevation 12.5 feet NGVD at the grate;

C. That the elevation of the crest of the outfall structure between Westwood and Canoe Creek subdivision be lowered from 12.1 feet NGVD to elevation 11.8 feet NGVD and that the bleeder of the structure be lowered from 11.5 feet NGVD to 11.3 feet NGVD.

11. The request to raise by six inches the catch basin which receives the flow from the off-site property was made so that more water would be detained on the off-site property during design storms. The request that the outfall structure between Westwood and Canoe Creek be lowered was made to authorize an increase in the peak discharge in a design storm event from the permitted 21 cubic feet per second to the proposed 21.3 cubic feet per second.

12. The data submitted by Westwood in support of its application included a backwater analysis prepared by Mr. Searcy and his staff. The backwater analysis is a detailed computer analysis of the Westwood surface water management system and the effects of the proposed modifications designed by Mr. Searcy and his engineering staff. The data also contained an analysis of the Canoe Creek subdivision surface water management system and the effects of the modifications on that system.

13. The backwater analysis determined that the Canoe Creek subdivision surface water management system was not operating as designed and that the system should be improved by regrading existing swales, adding additional culverts, and modifying existing weirs. Mr. Searcy made the following specific recommendations for improvements to the Canoe Creek subdivision surface water management system.

1. Station 0+00 (southern entrance road): Replace the existing 24" CMP culvert with 2 - 30" CMP culverts.

2. Station 7+69 (main entrance road):
Replace the existing 24" x 34" CMP Arch culvert with 2 - 24" x 35" CMP Arch culverts. Note: if existing 24" x 34" CMP Arch culvert is in good condition, just add 1 - 24" x 35" CMP Arch culvert at this location.

3. Station 13+00 (outfall structure):
Verify that the existing structure was built as designed and then increase the weir length to 6.1' at crest elevation 10.25'. The top of this weir structure should also be increased to elevation 20.0'. [The recommendation that the top of the weir structure be increased to elevation 20' was a typographical error. The correct elevation should be 12'.]

4. Station 13+00 to 14+78 (east-west swale):
Regrade the swale bottom to remove all high point greater than elevation 8.25'.

5. Station 14+78 (internal road)
Replace existing 24" x 34" CMP Arch culvert with 2 - 24" x 35" CMP Arch culverts and lower the invert elevation to 8.25'. Note: If the existing 24" x 34" CAP Arch culvert is in good condition, then just add 1 - 24" x 35" CMP Arch culvert at this location.

6. Station 13+23 to 19+29 (east-west swale) :
Regrade swale bottom starting at elevation 8.25' at station 15+23 and ending with elevation 8.5' at station 19+29.

7. Station 19+29 (weir structure):
Increase weir length to the permitted weir length of 5.0' at the existing weir crest elevation 10.14'.

14. Without the improvements to the Canoe Creek system recommended by Mr. Searcy, the Canoe Creek subdivision system will not function as designed and as permitted.

15. After the initial review of the application the SFWMD requested that Applicant submit additional information and that it clarify certain items. The Applicant provided all data and clarifications requested by the SFWMD. The SFWMD staff thereafter deemed the application complete. The Staff Report prepared by the SFWMD review team on March 24, 1989, recommended that the modification to the permit be granted with certain conditions. The conditions were of two types, limiting conditions, which are standard conditions attached to most permits, and special conditions, which are conditions unique to this permit. The special conditions, pertinent to this proceeding, are as follows:

11. Prior to the commencement of construction of the proposed surface water management system improvements within Canoe Creek (Permit No. 43-00135-

S), a permit modification to permit No. 43-00135-S shall be required.

12. This modification is conditioned on the downstream improvements to the Canoe Creek outfall system (Table I) being completed. If the Canoe Creek system is not improved, Westwood Country Estates, Inc. shall be required to submit revised plans and calculations demonstrating an alternate outfall route.

* * *

16. Any development of the 56-acre off-site area will require compliance with an allowable discharge not exceeding 3.4 CFS during the 10-year 3-day design event.

16. The improvements to the Canoe Creek system required by condition 12 are those conditions recommended by Mr. Searcy and set forth in paragraph 13 of this Recommended Order. Applicant has accepted the conditions that were attached by SFWMD to the granting of the proposed modification. As presented at the formal hearing, the application for modification incorporates the conditions imposed by SFWMD. The backwater analysis that was prepared by Mr. Searcy assumed that the improvements he recommended to the Canoe Creek surface water management system would be made.

17. Westwood has complied, in all material respects, with the SFWMD permitting rules and regulations and has supplied all information requested of it by SFWMD. The appropriate employees of SFWMD processed the modification application in accordance with SFWMD rules. All information deemed pertinent to the application was assembled, the data was reviewed, and the applicable permitting files were researched.

18. Applicant has provided reasonable assurances that all permitting criteria adopted by SFWMD will be met if the conditions attached to the application are implemented. SFWMD's flooding protection and drainage criteria, which was of particular concern at the hearing, will be met. There should be no impact on the level, flow, or quality of groundwater. Water quality standards adopted by the State of Florida as set out in Chapter 17-3, Florida Administrative Code, will have been met or exceeded, and there should be no adverse environmental impacts. The wetlands on the 56 acres of off-site area will benefit by the additional retention caused by the raising of the level of Catch Basin #23.

19. The surface water management system, with the modifications proposed by Applicant, can be effectively operated and maintained. A condition of the permit is that Applicant form a homeowner's association to take over the operation and maintenance of the system after development is completed.

20. The approval and implementation of the proposed modifications and conditions thereto will not adversely affect the public health and safety, adversely affect the legal rights of others, be harmful to the water resources of the State, or be contrary to public policy.

21. Petitioners have failed to factually refute Applicant's showing that it has provided reasonable assurances that all pertinent permitting criteria adopted by SFWMD will be met if the permit modification, as conditioned, is approved and implemented.

CONCLUSIONS OF LAW

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

23. The scope of this proceeding is limited to the issue of whether the application for modification of the Westwood surface water management system complies with the pertinent permitting criteria adopted by South Florida Water Management District set forth in Rule 40E-4.301, Florida Administrative Code. *Council of Lower Keys v. Charley Toppino & Sons, Inc.*, 429 So.2d 67, (Fla. 3rd DCA 1983). All evidence and testimony not related to that criteria is properly excluded as being irrelevant. *Johns-Manville Sales, Corp. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984), rev. den. 467 So.2d 999 (1985). See also, Section 120.58(1)(a), Florida Statutes.

24. Rule 49E-4.301, Florida Administrative Code, provides, in pertinent part, as follows:

- (1) In order to obtain a permit under this chapter, an applicant must give reasonable assurances that the surface water management system:
 - (a) provides adequate flood protection and drainage,
 - (b) will not cause adverse water quality and quantity impacts on receiving waters and adjacent lands regulated pursuant to Chapter 373, Florida Statutes,
 - (c) will not cause discharges which result in any violation, in surface waters of the state, of the standards and criteria of Chapter 17-3,
 - (d) will not cause adverse impacts on surface and groundwater levels and flows,
 - (e) will not cause adverse environmental impacts,
 - (f) can be effectively operated and maintained,
 - (g) will not adversely affect public health and safety,
 - (h) is consistent with the State Water Policy, Chapter 17-40, each
 - (i) for a DRI with a signed Preliminary Development Agreement with the Florida Department of Community Affairs, pursuant to Section 380.06(8), Florida Statutes, provides a surface water management system for that portion of the site approved for development

which is able to operate separately from the surface water management system for the balance of the project site and still meet applicable District criteria,

(j) meets any applicable basin criteria in Chapter 40E-41,

(k) will not otherwise be harmful to the water resources of the District, and will not interfere with the legal rights of others, as defined in Rule 17-40.070,

(l) is not against public policy,

(m) will meet the general and specific criteria in the document described in rule 40R-4.091(1)(a)7

(n) will meet the criteria for isolated wetlands, which are found in Appendix 7 of the document described in rule 40E-4.091(1)(a) and,

(o) will meet the criteria for above ground impoundments, which are found in Appendix 6 of the document described in rule 40E-4.091(1)(a).

25. Rule 40E-4.381, Florida Administrative Code, authorizes SFWMD to place both special and standard limiting conditions on a permit, an authority none of the parties challenge. If the conditions to the application cannot be implemented, including the recommended modifications to the Canoe Creek surface water management system, the modifications to the Westwood system cannot be made without Applicant being required to give additional reasonable assurances that all permitting criteria will, nevertheless, be met.

26. At the formal hearing, Applicant gave reasonable assurances that all permitting criteria would be met if the modifications and conditions thereto are approved and implemented. These reasonable assurances were established by the engineering designs supported by computer analysis and by the expert testimony in the areas of civil engineering, hydrology, surface water management permitting, biology and water quality. This conclusion that all reasonable assurances had been given was also reached by the staff of SFWMD. SFWMD staff reviewed the supporting information supplied by Applicant and the information available to it from its records and determined that reasonable assurances had been given that, if the conditions imposed on the application are implemented, all permitting criteria will have been met.

27. Once Applicant presented a prima facie case that reasonable assurances of all pertinent permitting criteria had been given, the burden of going forward with the evidence shifted to Petitioners. This prima facie showing was not negated or otherwise refuted by Petitioners. Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778 (Fla. 1st DCA 1981)

RECOMMENDATION

Based on the foregoing findings of facts and conclusions of law, it is

RECOMMENDED that South Florida Water Management enter a final order which approves application for the modification of Permit No. 43-00155-S filed by Westwood Country Estates, Inc., subject to the terms and conditions recommended by the South Florida Water Management District staff report.

DONE AND ENTERED this 5th day of December, 1989, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Hearing Officer
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
904/488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of December, 1989.

APPENDIX TO THE RECOMMENDED
ORDER IN CASE NO. 89-2197

The following rulings are made on the findings of fact submitted on behalf of Westwood Country Estates, Inc.

1. The proposed findings of fact in Section I are adopted in material part by paragraphs 4, 5, 7-11 and 15 of the Recommended Order.
2. The proposed findings of fact in Section II are adopted in material part by paragraph 3 of the Recommended Order.
3. The proposed findings of fact in Section III are adopted in material part by paragraph 7 of the Recommended Order.
4. The proposed findings of fact in Section IV are adopted in material part by paragraphs 6 and 7 of the Recommended Order.
5. The proposed findings of fact in Section V are adopted in material part by paragraph 6 of the Recommended Order.
6. The proposed findings of fact in Section VI are adopted in material part by paragraph 7 of the Recommended Order.
7. The proposed findings of fact in Section VII are adopted in material part by paragraph 8 of the Recommended Order.
8. The proposed findings of fact in Section VIII are adopted in material part by paragraphs 12-20 of the Recommended Order.
9. The proposed findings of fact in Section IX are rejected as being unsubstantiated by the record and as being a conclusion of law.

The following rulings are made on the findings of fact submitted on behalf of South Florida Water Management District.

1. The proposed findings of fact in paragraph 1 are adopted in material part by paragraph 2 of the Recommended Order.
2. The proposed findings of fact in paragraph 2 are adopted in material part by paragraphs 8 and 9 of the Recommended Order.
3. The proposed findings of fact in paragraph 3 are adopted in material part by paragraph 9 of the Recommended Order.
4. The proposed findings of fact in paragraph 4 are adopted in material part by paragraphs 9-11 of the Recommended Order.
5. The proposed findings of fact in paragraph 5 are adopted in material part by paragraphs 5 and 7 of the Recommended Order.

6. The proposed findings of fact in paragraph 6 are adopted in material part by paragraphs 15 and 18 of the Recommended Order.

7. The proposed findings of fact in paragraph 7 are rejected as being subordinate to the findings made in paragraph 3 of the Recommended Order.

8. The proposed findings of fact in paragraph 8 are adopted in material part by paragraphs 6 and 7 of the Recommended Order.

9. The proposed findings of fact in paragraph 9 are adopted in material part by paragraphs 6 and 7 of the Recommended Order and are rejected to the extent that they are subordinate to the findings of paragraph 7 of the Recommended Order.

10. The proposed findings of fact in paragraph 10 are rejected as being subordinate to the findings made in paragraphs 3 and 7 of the Recommended Order.

11. The proposed findings of fact in paragraph 11 are rejected as being subordinate to the findings made in paragraph 18 of the Recommended Order.

12. The proposed findings of fact in paragraph 12 are adopted in material part by paragraph 18 of the Recommended Order.

13. The proposed findings of fact in paragraph 12 are adopted in material part by paragraph 18 of the Recommended Order.

COPIES FURNISHED:

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