

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GARY L. GANDY,)
)
 Petitioner,)
)
 vs.) CASE NO. 90-4175
)
 ANTHONY CERSOSIMOS and)
 SOUTHWEST FLORIDA WATER)
 MANAGEMENT DISTRICT,)
)
 Respondent.)
)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William R. Cave, held a public hearing in the above-captioned matter on December 19, 1990, in Bartow, Polk County, Florida.

APPEARANCES

For Petitioner: GARY L. GANDY, Pro Se
OMEGA FARM
Post Office Omega
Waverly, Florida 33887

For Respondents: CERSOSIMO: BEACH A. BROOKS, JR.
PETERSON, MYERS, CRAIG, CREWS,
BRANDON & PUTERBAUGH, P.A.
Post Office Drawer 7608
Winter Haven, Florida 33883-7608

S.W.F.M.D.: Catherine D'Andrea and
Susan Dietrich
Assistant General Counsel
Southwest Florida Water Management
District
2379 Broad Street (U.S. 41 South)
Brooksville, Florida 34609-6899

STATEMENT OF THE ISSUES

Whether the applicant, Respondent Cersosimo can give reasonable assurances that the surface water management system as presently designed by the applicant and requested to be permitted will not diminish the capability of Lake Mabel in Polk County, Florida, to fluctuate through the full range established for it in Chapter 40D-8, Florida Administrative Code, in view of the fact that the floor elevation of the retention ponds is one-half foot below the elevation of the surface of Lake Mabel for the ten year flood warning level.

PRELIMINARY STATEMENT

This case arose by a petition for administrative proceeding wherein the Petitioner requested an administrative hearing concerning Respondent, Southwest Florida Water Management District's (District) proposed agency action in issuing Management of Surface Water Permit Application No. 405733.01.

Petitioner's request for administrative hearing dated June 5, 1990, raised several issues in his objection to the issuance of the permit. However, redesign of the Respondent's Plan Unit Development and the amendment to the application narrowed the Petitioner's objection to the above-stated issue.

At the hearing, it was stipulated that the burden was on the applicant, and in this regard the applicant presented its case first. The applicant, Respondent Cersosimo (Cersosimo) presented the testimony of Ronald S. Burchfield and Robert J. Brady. Cersosimo's exhibits 1 and 2 were received into evidence. Respondent District presented the testimony of William A. Hartmann. Respondent District's exhibits 1 through 4 were received into evidence. The Respondents' Joint Composite exhibit 1 was received into evidence.

Petitioner neither testified on his own behalf nor presented the testimony of any other witnesses. Petitioner's exhibit 1 was received into evidence. At the close of the hearing, Petitioner requested the late filing of an exhibit referred to as a plat. The request was granted but the exhibit was never filed.

A transcript of the proceeding was filed with the Division of Administrative Hearings on January 14, 1991. Respondent Cersosimo timely filed his Proposed Findings of Fact and Conclusion of Law which were adopted by the Respondent District. Petitioner has not filed any Proposed Findings of Fact and Conclusions of Law. A ruling on each Proposed Finding of Fact has been made as reflected in an Appendix the Recommended Order.

FINDINGS OF FACT

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

1. On May 3, 1989, Cersosimo submitted an application for a Management of Surface Water Permit to the District.

2. Subsequent to the submission of this application, the Polk County Board of County Commissioner (Commissioners) added an additional requirement to Cersosimo's Planned Unit Development (PUD) that there was to be a pre-development/post-development match for basin runoff in the event of a twenty-four hour one hundred (100) year storm event, i.e. following completion of this project (post-development) it will handle the same outflow or flow of storm water for the twenty four-hour one hundred-year storm event as in a pre-development situation.

3. Based on the Commissioners' requirement, the design of the PUD was amended to provide for the required storage capabilities.

4. On July 26, 1990, Cersosimo submitted to the District, its amended application, Management of Surface Water Permit No. 405733.01 incorporating the changes necessitated due to the Commissioners' additional requirement as to storm water runoff.

5. On August 24, 1990, Ramon E. Monreal, P.E., of the Polk County Engineering Division, noted in a letter of that same date referring to Cersosimo's modification of Retention Pond No. 300 for the project in question that "this revision appears to meet the PUD condition by the Board of County Commissioners for drainage and compliance with the Surface Water Management Ordinance".

6. The application of July 26, 1990, amends the original application by superceding and replacing that application.

7. In connection with the application for permit, soil borings were taken at the site location for the retention ponds in order to establish the elevation of the seasonal high water level (SHWL) for that site. The borings indicated an elevation for the SHWL of 110 feet to 112 feet above mean sea level (AMSL). The District conservationally established the elevation for the SHWL of this particular site as 112 feet AMSL.

8. The floor elevation of the lowest retention pond was established at 114.00 feet AMSL.

9. The elevation of the surface of Lake Mabel for the ten year flood warning Level is 114.50 feet AMSL as established by Rule 40D-8.624(1)(z), Florida Administrative Code.

10. District policy requires the floor elevation of a dry retention pond to be a minimum of one foot above the established elevation of the SHWL of that particular site.

11. Even though the surface elevation of Lake Mabel for the Ten Year Flood Warning Level was established as 114.50 feet AMSL, there is insufficient evidence to show that there was lateral migration of water from the lake's edge to the site of the soil borings such that it was evidenced by a demarcation in the soil profile. To the contrary, the evidence shows that there were demarcations in the soil profile to establish an elevation for the SHWL for this site of 110 feet to 112 feet AMSL.

12. The designed weir crest in the lower retention pond, Pond No. 300, has an approximate elevation of 118.50 feet AMSL which prevents water from coming over the top into the pond in the event Lake Mabel reaches the ten year flood level warning elevation of 114.50 feet AMSL.

13. The distance from the present water edge of Lake Mabel to the bottom of Pond No. 300 would be approximately 600 feet, laterally and if the lake reached the ten year flood level warning elevation of 114.50 feet AMSL, the lake's water edge would be approximately 100 feet laterally from the bottom of Pond No. 300.

14. There was sufficient evidence to show that even if the surface elevation of Lake Mabel reached the ten year flood level warning of 114.50 feet AMSL and the SHWL (ground water level) reached 112 feet AMSL, the retention ponds as presently proposed with a floor elevation of 114.00 feet AMSL would still percolate sufficiently, even though the percolation may be diminished from what it would be under present conditions, so that there would still be a pre-development/post-development match for basin runoff.

15. Cersosimo can give reasonable assurances that the surface water management system as presently proposed will not diminish the capabilities of Lake Mabel to fluctuate through the full range established for it in Chapter 40D-8, Florida Administrative Code.

16. Among others, the following specific conditions in pertinent part will be placed on the permit, if granted:

. . . The applicant shall visually monitor the ponds on a monthly basis to ensure that the ponds are dry within 36 hours from the end of the last rainfall event. Should the ponds fail to percolate the required water quality volume per District criteria, a permit modification shall be required. . . .

CONCLUSIONS OF LAW

17. 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.

18. The District has authority to regulate surface water activities within the confines of the District pursuant to Chapter 373, Florida Statutes, and Chapter 40D-8.613, Florida Administrative Code.

19. Section 40D-8.613, Florida Administrative Code, provides as follows:

(1) Flood level warnings are provided for a surface water body as an advisory statement for the public interest. Property owners, public officials and the general public are advised that flooding on a frequency of not less than a ten (10) year recurring interval is expected to occur at the indicated elevation. Flood waters may often rise above the flood warning level.

(2) Floor slabs, septic tanks and drain fields, docks, seawalls, and other physical improvements, on land near lakes and other impoundments for which flood warning levels have been established, should be so located and constructed sufficiently above the flood warning level such that their functions will not be impaired by the rising water.

The evidence clearly show that the retention ponds' function would not be impaired due to the rising water should the elevation of the surface level of Lake Mabel reach the ten-year flood warning level of 114.50 feet ASML, notwithstanding that the floor elevation of the retention ponds is 114.00 feet AMSL.

20. Section 40D-4.301(1)(e), Florida Administrative Code, provides that an applicant must give reasonable assurances that the surface water management system will not diminish the capabilities of a lake or other impoundments to fluctuate through the full range established for it in Chapter 40D-8, Florida Administrative Code. The applicant has met his burden in this regard.

21. While the applicant can give reasonable assurances as to the function of the retention ponds to allow pre-development/post-development match for basin runoff, he cannot give absolute assurances. Therefore, the District has placed specific conditions on the granting of the permit to require modification in the event the system does not function as anticipated.

RECOMMENDATION

Based upon consideration of the foregoing Findings of Fact and Conclusions of law, it is, recommended that the Southwest Florida Water Management District enter a Final Order granting the application for Management Surface Water Permit No. 405733.01, as proposed by the District.

RECOMMENDED this 12th day of February, 1991, in Tallahassee, Florida.

WILLIAM R. CAVE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of February, 1991.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 90-4175

The following constitute 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.

The Petitioner did not submit any Proposed Findings of Fact

Rulings on Proposed Findings of Fact
Submitted by Respondent Cersosimo

1. - 7. Adopted in Findings of Fact 1-7, respectively.
8. - 10. Adopted in Findings of Fact 10, 8 and 14, respectively.
11. Adopted in Findings of Fact 12 and 13.
- 12.-13. Adopted in Findings of Fact 13 and 11, respectively.

Respondent District adopted Respondent Cersosimo's Proposed Findings of Fact, therefore the same rulings would apply as was applied to Respondent's Cersosimo's Proposed Findings of Fact above.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS:

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. SOME AGENCIES ALLOW A LARGER PERIOD WITHIN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.