

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

THOMAS HIRT, )  
 )  
 Petitioner, )  
 )  
 vs. ) CASE No. 91-5689  
 )  
 SUN EAST DEVELOPMENT COMPANY and )  
 SOUTHWEST FLORIDA WATER MANAGEMENT )  
 DISTRICT, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Veronica E. Donnelly, held a formal hearing in the above styled case on November 15 and 19, 1991, in Tampa, Florida.

APPEARANCES

For Petitioner: Robert Persante, Esquire  
MERKLE & MAGRI  
7650 W. Courtney Campbell  
Causeway - Suite 1120  
Tampa, Florida 33607

For Respondent Andrew R. Reilly, Esquire  
Sun East: REILLY & LASSEIGNE  
Post Office Box 2039  
Haines City, Florida 33845

For Respondent Edward B. Helvenston, Esquire  
SWFWMD: Deputy General Counsel  
2379 Broad Street  
Brooksville, Florida 34609 6899

STATEMENT OF THE ISSUES

Whether the Respondent, Southwest Florida Water Management District, should grant the applicant, Sun East Development Company, a general construction permit for the management and storage of surface water pursuant to Permit No. 409376.01 issued July 25, 1991.

PRELIMINARY STATEMENT

On July 25, 1991, the Respondent, Southwest Florida Water Management District (SWFWMD), approved an application filed by Respondent, Sun East Development Company (Sun East), for a general construction permit for management and storage of surface water on Phase I of a Planned Development Unit, PUD 89-25, in Polk County, Florida.

In a petition filed August 12, 1991, Petitioner, Thomas Hirt (Hirt), timely requested an administrative hearing to contest the permitting decision. Petitioner Hirt, who is an adjacent landowner, alleges that Sun East has failed to comply with state and local law. He also disputes the factual determination that the project is outside the one hundred year flood plain. Further, Petitioner contends that all required governmental authorizations were not obtained prior to permit issuance. He alleges such prior authorizations are required according to his interpretation of the water management district's rules. As a result, Petitioner argues the proposed permit should not be allowed to take effect.

Prior to hearing, all of the parties agreed to the order of presentations and the burdens of proof based on the model set forth in Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 779 (Fla. 1st DCA 1981).

During the hearing, the applicant Sun East presented two witnesses and moved six exhibits into evidence. The agency, SWFWMD, called two witnesses and filed two separate volumes of applicable agency rules. Official notice has been taken of these rules. Petitioner testified in his own behalf and had twenty-eight exhibits marked. Twenty-seven were filed with the hearing officer. All of the submitted exhibits were accepted. A posthearing document submitted by Petitioner was accepted without objection as Petitioner's Posthearing Exhibit A.

A transcript was filed with the Division of Administrative Hearings on January 3, 1992. The opportunity to file proposed recommended orders was extended to February 13, 1992, to allow the parties to address the three writs of certiorari entered posthearing that involved the land and the proposed project at issue in these proceedings. A copy of the Order Granting Petitions for Certiorari is Petitioner's Posthearing Exhibit A.

The Petitioner waived his opportunity to file proposed findings of fact. Respondents jointly filed a Proposed Recommended Order. Rulings on the proposed findings of fact are in the Appendix to the Recommended Order.

#### FINDINGS OF FACT

##### A. Parties

1. Respondent Sun East is a corporation who seeks to create a Planned Unit Development, PUD 89-25, on its property located in Polk County, Florida.

2. Petitioner Hirt owns and resides on property adjacent to the Planned Unit Development. The only geographical boundary between the proposed project and Petitioner's property is Watkins Road.

3. Respondent SWFWMD is the water management district with permitting authority over the 5.36 acres involved in the permit application which is the subject of these proceedings.

##### B. Jurisdictional Areas of Controversy

4. Respondent Sun East began the application process for a surface water management general construction permit from SWFWMD for Phase I of its proposed development of PUD 89-25 on July 1, 1991. SWFWMD determined the application was complete on July 24, 1991. The permit which was issued the next day authorized

Respondent Sun East to perform the work outlined in the permit and shown by the application, approved drawings, plans, and other documents on file with SWFWMD.

5. Petitioner Hirt timely filed a formal administrative complaint in which he disputed the appropriateness of the permit issued. In support of his position, Petitioner identified a number of areas of controversy and alleged that the application and review process was insufficient.

6. Petitioner's allegations in his complaint, which are properly before the Hearing Officer, are as follows:

- a) The approved surface water management system will cause surface water runoff from the project to flood Petitioner's property. One potential cause of such anticipated flooding is the lack of proper percolation design in the surface water management storage areas.
- b) Contrary to permit representations, the property and the retention pond required by SWFWMD are in the 100 year flood plain.
- c) The project is in an environmentally sensitive area.
- d) Respondent Sun East has neither complied with all local requirements nor obtained all necessary federal, state, local and special district authorizations prior to the start of any construction authorized by the permit.

#### C. Site Information

7. The parcel of land on which the project will be located lies partially within the geographical limits of the South Florida Water Management District (SFWMD). The remaining land lies within the boundaries of the Southwest Florida Water Management District.

8. Originally, SFWMD gave Respondent Sun East a permit to construct Phase I of the project, along with conceptual approval for Phase II. The decision by Sun East to file the application for a surface water management general construction permit with SFWMD instead of SWFWMD was based upon advice from personnel at SWFWMD.

9. When it was later determined that SWFWMD would need to review an application for Phase I in order for the project to be properly permitted, SWFWMD acted quickly to reduce any potential delay to the project which could be attributed to its prior incorrect jurisdictional analysis. The agency's efforts were unrelated to any political connections or family relationships the former landowner, Jack Watkins, may have with past or current members of the Florida Legislature or Congress.

10. The grading plan for Phase I of the project coupled with the pre-development and post-development 25 year storm event analysis, assessed drainage concerns associated with Phase I of the PUD.

11. Water flow analysis for the site that considered existing conditions and proposed improvements, demonstrates that the property west of Watkins Road is not part of the surface water management system for this project. The cross

drain beneath Watkins Road to the south of the proposed project deals with a different, natural conveyance system to Lake Pierce which is utilized by property owners such as Petitioner Hirt on the east side of the roadway.

12. The proposed surface water management system for Phase I will not affect the drainage conveyance system utilized by property owners on the east side of Watkins Road.

13. The stormwater management collection and conveyance system for Phase I was designed to convey the stormwater runoff from a 25 year 24-hour rainfall event, as required. It was not overdesigned to deal with a more intense, longer rainfall or storm event.

14. Essentially, stormwater treatment and attenuation will be provided by the two proposed detention ponds A & B, as depicted on the site plan. Runoff from the first inch of rainfall will be filtered through a proposed side berm filter system in Pond A.

15. The Polk County Soil Survey and field observations were used to assist in the weir control structure design. The weir was designed to restrict the post-development 25 year discharge to the pre-developed 25 year runoff rate. The project does not rely on percolation to offset post-development changes in the surface water management system design. As a result, percolation rates are not a factor to be dealt with in a design review.

#### D. Flood Plain

16. The 100 year elevation of 79 feet above mean sea level delineates the 100 year flood plain on the property in Phase I. According to the contour map, the existing Ponds 1 and 2 have depression contours below the flood plain.

17. The water level in Existing Pond 1 is 78.24 feet. The water level in Existing Pond 2 is 78.14 feet.

18. These ponds are not a major or significant part of an existing, natural surface water storage system in the area. They are just minor surface depressions.

19. None of the lots contained in Phase I encroach upon the 100 year flood plain level.

#### E. Environmental Concerns

20. The parties stipulated at hearing that SWFWMD rule criteria relating to wetland and natural resource impacts were met by Sun East's general surface water management permit application.

#### F. Local Requirements

21. Prior to making application to SWFWMD for a permit in this case, Respondent Sun East obtained approval for Phase I of PUD 89-25 from Polk County.

22. Since that time, the zoning approval was quashed by the circuit court. Respondent Sun East was ordered to obtain the SWFWMD permit before reapplying for zoning approval.

23. The limiting conditions which are part of the permit issued by SWFWMD state:

The permittee shall comply with all applicable local subdivision regulations and other local requirements. In addition the permittee shall obtain all necessary Federal, State, local and special district authorizations prior to the start of any construction or alteration of works authorized by this permit.

24. The permit limiting conditions do not require that all other permits be acquired prior to the application for this permit. Instead, the limiting conditions advise that all other necessary permits must be acquired prior to construction or alteration of works begun pursuant to this permit.

25. Petitioner began construction authorized by the permit after SWFWMD issued its permit approval on July 25, 1991.

26. The Petitions for Certiorari on the final approval for Phase I from Polk County was already filed when the application for a permit from SWFWMD was requested by Sun East. The completed application does not reflect that the Polk County zoning approval was being challenged, and SWFWMD was not made aware of the possibility that it could be overturned at a later date.

27. The permit issued by SWFWMD was timely challenged by Petitioner, before the approval became final agency action.

28. Sun East did not comply with the limiting condition in the permit that requires a permittee to obtain all necessary authorizations prior to construction as the zoning approval was still unsettled when construction began.

29. Petitioner's challenge to the SWFWMD permit was filed in good faith as numerous disputes of fact existed regarding this permit prior to resolution in this Recommended Order. Based upon the information and documentation given to Petitioner when the permit was issued, it reasonably appeared that his substantial interests were affected by the proposed drainage plan associated with the development.

#### CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter addressed in this Recommended Order, pursuant to Section 120.57(1), Florida Statutes.

31. As the applicant in this cause, Respondent Sun East bears the burden of showing its entitlement to the requested permit by the preponderance of the evidence. Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 779 (Fla. 1st DCA 1981).

32. A stormwater management system is defined in Section 373.403(10), Florida Statutes, as follows:

"Stormwater management system" means a system which is designed and constructed or implemented to control discharges which are necessitated by rainfall events, incorporating

methods to collect, convey, store, absorb, inhibit, treat, use or reuse water to prevent or reduce flooding, overdrainage, environmental degradation, and water pollution or otherwise affect the quantity and quality of discharges from the system.

33. In this case, the stormwater management system involves permitting in two different water management districts. Each district was required by law to permit the construction or alteration of the stormwater management system pursuant to its own rules to assure that the project will comply with Chapter 373, Florida Statutes and will not be harmful to the water resources of the particular district. This permitting authority is found in Section 373.413(1), Florida Statutes, which provides:

... the (district) may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system ... will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district.

34. To implement this statutory mandate, SWFWMD has adopted Chapter 40D-4, Florida Administrative Code, which sets forth the rules relating to Management and Storage of Surface Waters within this district's boundaries. Pursuant to statute and the policy set forth in this chapter, SWFWMD is the only district that can permit the system within its boundaries. The fact that South Florida Water Management District had to review the design within SWFWMD's boundaries under its rules to deal with the discharge issues within its borders, did not eliminate SWFWMD's permitting duties. Contrary to Petitioner's suggestion of confusion or incompetence in this regard, there were merely separate district permitting responsibilities.

35. Rule 40D-4.101(2), Florida Administrative Code, requires an applicant to provide site information which includes a topographic map of the site and adjacent hydrologically related areas. An overall map of the area showing existing runoff patterns and size, location, topography and land use of off site areas which drain through, on to, and from the project must be provided to support an application. The contents of this application clearly reveal that Petitioner's land is not part of the surface water management system for this project. Percolation tests proposed by Petitioner are unnecessary because design conditions do not rely on percolation as a form of surface water management. Petitioner's concern that the development of the project will cause surface water runoff and foreseeable flooding onto his property is unwarranted, according to applicable civil engineering standards, the calculations and computer modeling for this project. Reasonable assurances of adequate flood protection were established as required by Rule 40D-4.301(1)(a), Florida Administrative Code.

36. Rule 40D-4.101(2)(a)5, Florida Administrative Code, provides:

If the project is in the known floodway of a stream, or other watercourse, the floodway should be identified and approximate flooding elevations determined. The 100 year flood

plain elevations and limits should be identified, if applicable.

37. The applicant provided this information to SWFWMD. Based upon the calculations required for the determination of minimum building flood and road elevations, reasonable assurances were provided in the application to show that the surface water management system will not diminish the capability of Lake Pierce to fluctuate through the full range established in Chapter 40D-8, Florida Administrative Code. Therefore, Petitioner's concern about the flood plain and minimum flood levels as it relates to the SWFWMD permit is unfounded. It should be noted, however, that the district's permitting scheme may differ from regulations promulgated by other governmental bodies in regards to minimum flood levels. Rule 40D-8.611(4), Florida Administrative Code, states:

Property owners are hereby advised that compliance with District Rules and Regulations does not relieve owners of the responsibility of complying with other regulations and ordinances required by local governing bodies, e.g., as in connection with the National Flood Insurance Program.

38. Petitioner's claim that this surface water management system will increase his taxes in the future due to government spending needed to correct its flaws is beyond the review criteria involved in these proceedings, as set forth in the Conditions of Insurance of Permits in Rule 40D-4.301, Florida Administrative Code. Presumably, the standards and criteria applied by SWFWMD assure that the design and performance of a surface water management system will provide adequate flood protection and drainage.

39. SWFWMD is neither required nor authorized to deny or modify its permit based upon noncompliance with local land use restrictions, because the issuance of the permit must be based only upon the applicable standards and rules promulgated by the district. See *Council of Lower Keys v. Charley Toppino & Sons, Inc.*, 429 So.2d 67, 68 (Fla. 3d DCA 1983). Remedies apart from this permitting scheme are available should the applicant violate Polk County's land use restrictions. *Taylor v. Cedar Key Sewerage District*, 590 So.2d 481 (Fla. 1st DCA 1991).

40. As part of the District's permitting scheme, SWFWMD allows a permittee to obtain other authorizations for the project after the issuance of this permit as long as these other authorizations are obtained prior to construction of works authorized by this permit. This limiting condition is found in Rule 40D-4.381(2)(c), Florida Administrative Code, which provides:

The permittee shall comply with all applicable local subdivision regulations and other local requirements. In addition, the permittee shall obtain all necessary Federal, State, local and special district authorizations prior to the start of any construction or alteration of works authorized by this permit.

41. During the construction of any stormwater management system, SWFWMD is required to make periodic inspections at its expense to ensure conformity with the approved plans and specifications included in the permit. Section 373.423(1), Florida Statutes. Pursuant to such an inspection process, the

permittee is given written notice of any noncompliance. In addition to such notification, SWFWMD is required to order immediate compliance with such plans and specifications. The failure to act in accordance with the order shall result in the initiation of revocation proceedings against the permit. Section 373.423(2), Florida Statutes, Rule 40D-4.461, Florida Administrative Code.

42. The facts adduced at hearing reveal that construction of the surface water management system was begun prior to the County's authorization becoming final. As a result, Sun East is not in compliance with the SWFWMD permit's limiting condition that requires such authorization prior to the construction start.

#### RECOMMENDATION

Based upon the foregoing, it is RECOMMENDED:

1. That SWFWMD issue the general construction permit for the surface water management system for Phase I, within the limits indicated in the intent to issue, subject to conditions contained therein.

2. That SWFWMD initiate an inspection of the stormwater management system at its expense to ensure conformity with the approved plans and specifications.

3. That appropriate action be taken under Chapter 373, Florida Statutes, to prevent the continued violation of the limiting condition in the permit relating to construction starts.

RECOMMENDED this 24th day of March, 1992, in Tallahassee, Leon County, Florida.

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VERONICA E. DONNELLY  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904)488-9675

Filed with the Clerk of the Division  
of Administrative Hearings this 24th  
day of March, 1992.

#### APPENDIX TO RECOMMENDED ORDER, CASE NO. 91-5689

Joint Proposed Findings of Fact filed by Respondents are addressed as follows:

1. Accepted. See HO #3.
2. Accepted. See HO #3.
3. Accepted. See HO #2.
4. Accepted. See HO #4.
5. Accepted. See HO #4.
6. Accepted.
7. Accepted.



8. Accepted. See HO #20.
9. Accepted.
10. Accepted.
11. Accepted.
12. Accepted. See HO #19.
13. Accepted. See HO #19.
14. Rejected. Irrelevant.
15. Rejected. Irrelevant.
16. Rejected. Irrelevant.
17. Rejected. Irrelevant.
18. Accepted. See HO #25.
19. Accepted.
20. Accepted.
21. Accepted.
22. Rejected. Irrelevant
23. Rejected. Contrary to fact. See HO #28.

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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.