

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTH FLORIDA WATER MANAGEMENT )  
DISTRICT, a public corporation, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 92-3747  
 )  
JAMES P. MCCARTHY, )  
 )  
Respondent, )  
\_\_\_\_\_)

RECOMMENDED ORDER

A hearing was held in this case in West Palm Beach, Florida on September 23, 1992 before Arnold H. Pollock, a Hearing Officer with the Division of Administrative Hearings.

APPEARANCES

For the Petitioner: Scott Allen Glazier, Esquire  
South Florida Water Management District  
P.O. Box 2480  
West Palm Beach, Florida 33416-4680

For the Respondent: James P. McCarthy, pro se  
6017 Southern Road South  
West Palm Beach, Florida 33415

STATEMENT OF THE ISSUES

The issue for consideration in this matter is whether Respondent is encroaching on the District's Canal C-51 right of way at the rear of 6017 Southern Road South in Palm Beach County.

PRELIMINARY MATTERS

By Second Notice of Violation dated April 9, 1992, the South Florida Water Management District, (District), notified the Respondent, James P. McCarthy, that because it had not received an application for permit or modification for the water line which existed across its right of way at the back of his property, he was in violation of Section 373.085, Florida Statutes and it was assessing a civil fine. Thereafter, on April 23, 1992, Respondent filed a Request For Initiation Of Formal Proceedings with the District which was considered as a request for formal hearing, and on June 19, 1992, the matter was forwarded to the Division of Administrative Hearings for appointment of a Hearing Officer. On July 28, 1992, after receipt of the parties' Joint Response to the Initial Order entered herein, by Notice of Hearing the matter was set for hearing in West Palm Beach on September 23, 1992, at which time it was held as scheduled.

At the hearing, Petitioner presented the testimony of Douglas J. Sykes, a Senior Engineering Field Representative for the District; Joseph G. Walsh, a Senior Technical Supervisor - Engineering, for the District; and Bernard L. Shattner, the District's Director of Construction Management. Petitioner also introduced Petitioner's Exhibits 1 through 12. Respondent testified in his own behalf and presented the testimony of Mr. Sykes, who had previously testified for Petitioner; Blair R. Littlejohn, III, a District employee; and Thomas L. Frantz, the District's Director - Right of way Division, Land Management Department. Respondent also introduced Respondent's Exhibits A and C through F.

A transcript was provided. Subsequent to the hearing, Counsel for Petitioner submitted Proposed Findings of Fact which have been accepted and, as appropriate, are incorporated herein. Respondent submitted a closing statement in writing and offered a post-filed video tape which, however, was not accepted or viewed by the undersigned. The undersigned officially recognized the mutual quitclaim deeds exchanged between the District and the McCarthys; Chapter 373, Florida Statutes; Rule 40E-6, F.A.C.; and pertinent portions of the District's Permit Information Manual, Volume IV.

#### FINDINGS OF FACT

1. By Pre-Hearing Stipulation, the parties agreed, and it is so found, that the District is a public corporation in Florida under Chapter 373, Florida Statutes, and Chapter 40E, F.A.C.. It exists as a multipurpose water management district with its principal office in West Palm Beach.

2. Respondent James P. McCarthy and his wife, Rebecca, reside at 6017 Southern Road South in West Palm Beach. This property is located within Section 3, Township 44 South, Range 42 East, in Palm Beach County.

3. On December 31, 1991, the District issued a Notice of Violation to the Respondent notifying him that his 2 inch pvc irrigation line, exposed near the top of the bank due to erosion, constituted an encroachment on the District's right-of-way adjacent to Canal 51 at the rear of his property. The line was not removed.

4. On April 9, 1992, the District issued its Second Notice of Violation to Respondent McCarthy assessing a civil penalty in the ultimate amount of \$560.00 for the same alleged encroachment, and on April 24, 1992, Mr. McCarthy filed his Petition for Formal Hearing to contest that action.

5. Mr. McCarthy does not contest the fact that the line exists as indicated by the District but debates the allegation that it constitutes an encroachment violation requiring a permit, contending that the District has failed to properly complete the work it promised to do on his property, the completion of which is a condition precedent to the requirement for a permit.

6. The South Florida Water Management District owns a right-of-way located on the south bank adjacent to C-51 canal in West Palm Beach, and the McCarthy's property is adjacent to that right-of-way. They have constructed a 1 1/2 inch PVC lawn irrigation line from the sprinkler system in their backyard beneath and across the District's right-of-way into the canal. According to Douglas Sykes, the District's senior engineering field representative in the area, who inspected the McCarthy's pipe line subsequent to the completion of the Corps' work, the line meets the District's standards and is permissible. All that is required is for McCarthy to make the requisite application and pay the permit fee.

7. On April 17, 1989, the McCarthys and the District entered into a written Settlement Agreement by which both granted deeds to each other for portions of the land adjacent to the canal for the payment of the sum of \$11,000.00, plus attorneys fees, to be paid to the McCarthys. This agreement did not, however, address either the slope or grade of the canal bank adjacent to the McCarthy property. The bank slope was to be constructed by the U.S. Army Corps of Engineers in accordance with their proposed constructions plans. The agreement did, however, call for the McCarthys to obtain an irrigation permit pursuant to District criteria "after completion of construction."

8. The Director of the District's Right-of-Way Division, responsible for the enforcement of the occupancy regulations in the right-of-way, considered the canal complete when the Corps ceased its construction activities and removed its equipment. This was done before September, 1991. The Corps notified its contractor that it accepted the C-51 project as complete on March 20, 1991. Mr. Sykes also inspected the area subsequent to the departure of the Corps' contractor. He found the work to be consistent with the District requirements, though as late as June, 1992, some additional work was being done by the District on property to the east of the McCarthy property. There is some indication that when the District sought permission to cross McCarthy's property line to access that work area, permission was denied. The District crossed McCarthy's property anyway, causing some minor damage. This work has now ceased.

9. The District employee who negotiated the settlement agreement with the McCarthys intended for the term "completion of construction" to mean the moment when the Corps relinquished its control of the right-of-way to the District. This was done on September 4, 1991. Other landowners applied for and received permits for irrigation lines when the Corps' contractor left the site.

10. As McCarthy tells it, in early 1990, after the settlement agreement was signed, the heavy construction was begun on the canal project and the trees were removed. A roadway was put in and the contractor began to install a large earthenware berm on the property. After some of it was done, he stopped the workers and found that the berm should go on another property. It was removed and after that, no other work was done.

11. Mr. McCarthy contends the agreed-upon canal bank was not properly constructed by the Corps. He claims the Corps' contractor left the canal bank without the required grading and in a rough state without sod. This is, supposedly, the only parcel that was not graded properly or sodded. He was left with a 1 1/2 :1 slope - very steep, and he complained about this in writing to the District because it was not what he claims they had all agreed upon. Mr. Shattner, the District's Director of Construction Management, indicates that regardless of what drawing is examined, the slope is no more gentle than 2:1.

12. Throughout 1990 and 1991, Mr. McCarthy alleges, he repeatedly advised the District that it had not lived up to their agreement but never got an answer. The agreement does not define the slope to be used except as it referred to a survey which was supposedly attached to the agreement. Towards the end of 1991, Mrs. McCarthy wrote to Mr. Swartz of the District about the work but received no answer. She then called the office of Mr. Creel, the District Executive Director, to complain. On December 19, 1991, someone called back and agreed to send someone out to look at the berm. No one came, however, and the next contact with the District was the violation letter of December 31, 1991.

13. Mr. McCarthy has repeatedly taken the position with the District that it has not lived up to the terms of its agreement with him and he will not apply for a permit for the line until the construction is completed properly. The current line complained of by the District is temporary and will be destroyed by the corrective construction. The residue of the Corps' work remaining on his property is, he complains, unsafe. It does not conform to either the county code or the District's own manual which calls for a 4:1 ratio.

#### CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. Section 120.57(1), Florida Statutes.

15. The authority of the state to control the use of the waters of this state is found in Chapter 373, Florida Statutes, and, in the provisions of Section 373.016, the state's policy in that regard is outlined. Specific among the purposes of water regulation are protection of the state's water supply, flood protection, and the prevention of damage from soil erosion and drainage.

16. Jurisdiction over the actual management of water resources in the area in question has been delegated to the Petitioner, South Florida Water Management District under the provisions of Section 373.085, Florida Statutes,. The District has, at Rule 40E-6, F.A.C., defined it's requirement for permitting encroachments into or upon District rights-of-way. Specifically, the permit requirement, for the purpose of insuring access of the District to the right-of-way for maintenance, and to insure compliance with the statutory requirements, is found at Rule 40E-6.041, F.A.C.

17. The McCarthys do not dispute that a permit will ultimately be required for their water line which crosses the District's right-of-way at the rear of their property. They concede that when the Corps project has been finally and satisfactorily completed, the permit will be required. It is the question as to whether the Corps work has been completed that is the crux of this instant dispute.

18. The District has claimed that evidence regarding the degree of slope of the canal berm at the back of the McCarthy property is irrelevant to the issue of whether they are required to have a permit for their irrigation line. Both parties agree that the issue is whether the work done by the Corps has been completed as provided in the settlement agreement, and the McCarthys contend that the improper slope has a direct bearing on whether the Corps' work has been "completed" so as to call into play the requirement for the permit. Claiming that it has, the District seeks to assess a civil penalty of Five Hundred Sixty Dollars, (\$560.00) for what it alleges to be the McCarthy's violation of its rule. If determined to be owing at all, the penalty assessed is within statutory and District criteria.

19. The evidence clearly establishes that the berm constructed at the back of the McCarthy property as a part of the C-51 canal project maintains a slope no more gentle than 2:1. This is considerably steeper than that provided for in the District's Permit Information Manual, Volume IV, which, at section 3.2.4.4.1 d, dealing with side slopes, states:

... for purposes of public safety, water quality enhancement and maintenance, all

wet retention/detention areas should have side slopes no steeper than 4:1 (horizontal:vertical) out to a depth or two feet below the control elevation.

and which at section 3.2.4.4.2 a, states:

Perimeter maintenance and operation easements of 20 feet (minimum preferable) width at slopes no steeper than 4:1 (horizontal:vertical) should be provided beyond the control elevation water line.

20. Whichever provision is applicable, that regarding the retention area or the area of the maintenance easement, it is clear the slope should be no steeper than 4:1, and it is equally clear that is significantly more gentle than the 1 1/2:1 or 2:1 slope that exists.

21. Nonetheless, the failure of the slope to comply with the District's manual does not have any bearing on the issue of whether the District accepted the construction as complete. Clearly, it has done so, and, therefore, the terms of the settlement agreement, calling for a permit to be required upon completion of the project, have been met. Any dispute which remains between the McCarthys and the District must be the subject of a collateral action over which this tribunal has no jurisdiction. In that regard, however, the condition of the slope is of sufficient gravity as a mitigation factor to support a waiver of any civil penalty against the McCarthys deemed applicable up to this time.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is, therefore:

RECOMMENDED that a Final Order be issued dismissing the assessment of the currently assessed \$560.00 civil penalty against the Respondents herein, James and Rebecca McCarthy, but requiring them to apply within 30 days from the date of that Order for a permit to construct and maintain an irrigation pipeline across the District's right-of way for Canal C-51 at the rear of their property.

RECOMMENDED this 30th day of December, 1992, in Tallahassee, Florida.

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ARNOLD H. POLLOCK  
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 30th day of December, 1992.

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 consult with the agency which will issue the Final Order in this case concerning its rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency which will issue the Final Order in this case.