

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 95-0049
	)	
ROBERT ROBINSON,	)	
	)	
Respondent.	)	
_____	)	

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 May 18, 1995, in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Scott Allen Glazier, Esquire  
South Florida Water Management District  
3301 Gun Club Road  
West Palm Beach, Florida 33416

For Respondent: Robert Robinson, pro se  
7900 Southwest 173rd Terrace  
Miami, Florida 33157

STATEMENT OF THE ISSUES

Whether the Petitioner (the District) has the authority and cause to revoke Right of Way Occupancy Permit Number 9591 that permitted Respondent to erect a fence and maintain two oak trees on real property that is subject to the District's maintenance easement and, if so, whether the District has the authority and cause to demand the removal of the fence, the two oak trees, and a key lime tree from the easement area.

PRELIMINARY STATEMENT

Respondent is the owner of a single family residence in Dade County, Florida, that abuts the District's C-100 Canal. This canal is owned and maintained by the District and is an essential part of its flood control plan. Adjacent and parallel to the north bank of the canal in the vicinity of Respondent's property is a strip of land twenty feet wide that is owned by the District and used for operation and maintenance of the canal. Adjoining and parallel to the maintenance strip owned by the District is a strip of land that forms the rear 20' of the residential lot owned by Respondent. This portion of the Respondent's property (the easement area) is subject to an easement that gives the District the right to use the easement area for maintenance and operation of the canal.

On April 9, 1992, the District issued Right of Way Occupancy Permit Number 9591 (Permit 9591) to the Respondent. This revocable permit allowed Respondent to encroach onto the maintenance easement by erecting a fence and maintaining two oak trees, subject to certain limiting conditions.

On November 15, 1994, the District issued an Administrative Complaint and Order which, subject to Respondent's due process rights, revoked Permit 9591 and demanded that Respondent remove the fence, the two oak trees, and a key lime tree that encroached on the easement. The key lime tree had not been included as a permitted encroachment by Permit 9591. The Administrative Complaint and Order ordered the following:

1. Right of Way Occupancy Permit No. 9591, authorizing a fence enclosure and two trees is hereby REVOKED, effective thirty (30) days from the date of service of this Administrative Complaint and Order and Notice of Intent to Revoke Permit.

2. Respondent shall remove the fence enclosure, trees [the two oak trees and the key lime tree] and any other items that may be located on the District's right of way without authorization and restore the District's right of way to its original or better condition within thirty (30) days from the date of service of this Administrative Complaint and Order and Notice of Intent to Revoke Permit.

3. Respondent shall hold and save the District harmless from any and all damages or claims which arise from Respondent's compliance activities.

4. Respondent, pursuant to Rule 40E-6.381, Florida Administrative Code, shall pay all investigative costs, court costs, and reasonable attorney's fees incurred by the District in obtaining compliance with the terms of this Order.

5. In the event Respondent fails to comply with the above terms, the District shall remove all encroachments, undertake appropriate restoration work (which shall be determined by District staff), and take any and all measures the district deems necessary to effectively terminate Respondent's present and potential future unauthorized use of the District's lands and works.

6. Pursuant to sections 373.044, 373.083, 373.085, 373.086, 373.119, 373.129, 373.126, 373.603 and 120.609 (sic), Florida Statutes, and Rules 40E-1.609, 40E-6.341 and 40E-6.491, Florida Administrative Code, the District is authorized to enforce the terms of this Order and seek other remedies which include but are not limited to:

- a. An injunction to abate the violations;
- b. Civil penalties in an amount not to exceed \$10,000.00 per day, each day constituting a separate offense; and
- c. Investigative costs, court costs, and reasonable attorney's fees. Such attorney's fees shall be based

upon their fair market value of the services provided,  
based upon what a private attorney would charge.

Respondent timely challenged the District's intended action, the matter was referred to the Division of Administrative Hearings, and this proceeding followed.

At the formal hearing, the District presented the testimony of Tom Fratz, Abbe Hoctor, and Clarence Tears. Mr. Fratz is employed as Director of the District's Right of Way Division. Ms. Hoctor is employed by the District as an environmental scientist and was accepted as an expert witness in the field of landscape architecture. Mr. Tears is employed by the District as the Regional Operation Maintenance for the District's Miami Field Station. The District presented 7 exhibits, 6 of which were admitted into evidence. Respondent presented no testimony and no exhibit.

A transcript of the proceedings has been filed. Rulings on the District's proposed findings of fact may be found in the Appendix to this Recommended Order. The Respondent did not file a post-hearing submittal.

In its proposed recommended order, the District requests that its Administrative Complaint and Order entered November 15, 1994, be "upheld, in toto". The matters "ordered" in paragraphs 3, 4, 5, and 6 were not at issue in this proceeding and nothing contained herein should be construed as granting the District such relief. Whether the District is entitled enforce its contractual and property rights as set forth in paragraphs 3-6 would be within the jurisdiction of a circuit court. See, Article V, Section 5, Florida Constitution, and Section 120.57(1), Florida Statutes. There was no evidence as to any costs or attorney's fees incurred by the District in bringing the instant proceeding.

#### FINDINGS OF FACT

1. Respondent is the owner of a single family residence located at 7900 Southwest 173rd Terrace, Miami, Florida. The rear of Respondent's property backs up to the north right of way of the District's C-100 Canal.

2. The C-100 Canal is one of the works of the District and is an essential part of the District's flood control plan. The C-100 Canal system supports surface drainage and flood protection to approximately 40 square miles of Dade County, Florida.

3. The property owned by the District in fee simple includes a strip of land that is adjacent and parallel to the north bank of the canal. This strip of land is twenty feet wide and provides the District with a portion of the land it requires for maintaining the canal.

4. On February 18, 1964, Respondent's predecessor in title executed a document styled "Permanent Maintenance Easement" that granted to the District's predecessor agency an easement on and across a strip of land that constitutes the rear twenty feet of Respondent's property. The easement area is adjacent and parallel to the maintenance strip owned by the District. The instrument granting the easement provided, in pertinent part, as follows:

. . . the grantors do hereby grant, bargain,  
sell and convey unto the grantee . . . its  
successors and assigns, the perpetual maintenance

easement and right for and to the use and enjoyment for canal maintenance purposes of the following described lands . . . for the purpose of ingress and egress in maintaining and operating Canal C-100, one of the works of the District . . . , and for no other purpose, it being understood and agreed that said land shall not be excavated and that no permanent structure of any kind shall be placed thereon. . . .

All the covenants and agreements herein contained shall extend to and be binding upon the parties hereto and their respective . . . successors and assigns.

5. On April 9, 1992, the District issued to Respondent Permit Number 9591 which, subject to limiting conditions, authorized certain encroachments by Respondent into the easement area and described those encroachments as follows:

4' high chain link fence enclosure encroaching 20' and 2 trees inside the fenced enclosure within the District's 20' canal maintenance easement along the north right of way of C-100 located at the rear of 7900 Southwest 173rd Terrace.

6. Permit 9591 provided, in pertinent part, as follows:

. . . The Permittee [the Respondent], by acceptance of this permit, hereby agrees that he shall promptly comply with all orders of the District and shall alter, repair or remove his use solely at his expense in a timely fashion. . . .

. . . By acceptance of this permit, the permittee expressly acknowledges that the permittee bears all risks of loss as a result of revocation of this permit.

7. The District has enacted Rule 40E-6.381, Florida Administrative Code, which provides the following standard limiting conditions of Permit 9591 pertinent to this proceeding:

The District's authorization to utilize lands and other works constitutes a revocable license. In consideration for receipt of that licensure, permittees shall agree to be bound by the following standard limiting conditions, which shall be included within all permits issued pursuant to this chapter.

\* \* \*

(3) This permit does not create any vested rights, and . . . is revocable at will upon reasonable prior written notice. Permittee bears all risk of loss as to monies expended in furtherance of the permitted use. Upon revocation, the permittee shall promptly modify, relocate or remove the permitted use. In the event of failure to so comply within the

specified time, the District may remove the permitted use and permittee shall be responsible for all removal costs.

\* \* \*

(7) The permittee shall not engage in any activity regarding the permitted use which interferes with the construction, alteration, maintenance or operation of the works of the District, including:

\* \* \*

(c) planting trees . . . which limit or prohibit access by District equipment and vehicles, except as may be authorized by the permit.

8. Among the special limiting conditions of the permit are the following:

8. The permittee is responsible for pruning trees in order that their canopies do not encroach within areas needed by the district for canal maintenance purpose. Upon the request of the district, the permittee shall trim or prune any growth which the district has determined interferes with the district's access, operations, and maintenance.

9. Permittee shall be responsible for the maintenance of the canal right of way within the fenced area and also for the maintenance of the right of way to a point 10 feet outside the fenced area.

10. At the time of the formal hearing, the easement area was enclosed by the fence that Respondent erected pursuant to Permit 9591 and there existed within the easement area two live oak trees and one key lime tree. The two oak trees were approximately ten years old. The evidence did not establish whether Respondent planted (or transplanted) the two oak trees. The key lime tree was planted by Respondent after the issuance of Permit 9591.

11. It is necessary that the C-100 Canal be properly maintained and that the District have access to the canal for routine and emergency maintenance. Following Hurricane Andrew in August 1992, the District developed a maintenance plan for the C-100 Canal. The District did not have an established canal maintenance plan for the portion of the canal relevant to this proceeding at the time it granted Permit 9591.

12. Prior to the development of its maintenance plan, little maintenance had been done on the canal in the area of Respondent's property.

13. The District's decision to revoke Permit 9591 and to demand the removal of the fence and trees is in furtherance of the District's right of way maintenance plan and is only part of the District's enforcement and management efforts to remove permitted and non-permitted encroachments from maintenance easements in this area of the C-100 Canal. Respondent's property has not been singled out for this action. At the time of the formal hearing, Respondent's property was the only area in the vicinity on which the District does not have 40' of unobstructed access adjacent to the canal.

14. Respondent disputes that the District needs access to the portion of his property that is subject to the easement for the proper operation and maintenance of the C-100 Canal. Pertinent to this proceeding, the maintenance plan adopted by the District includes the use of land based equipment for

erosion control and mowing of maintenance right of way areas and the routine and emergency dredging of the canal channel. The plan sets forth the anticipated maintenance activities for the area of the canal relevant to this proceeding, the type equipment that will be used, and the amount of right of way that will be required to perform the work. Emergency maintenance of the canal may be required in response to a heavy rain event since the District must be able to respond quickly if a part of the canal becomes clogged with debris.

15. The equipment that the District will likely use for maintenance includes batwing mowers, front end loaders, dump trucks, draglines, and towboats. The District established that the 20' strip of land it owns in fee title does not provide sufficient room for the maneuvering of the heavy equipment that will be required for the routine and emergency maintenance of the canal. These pieces of heavy equipment require 40' of unobstructed land to set up and to operate safely and effectively. The District established that it needs the additional area provided by the easement on Respondent's property to properly perform its operation and maintenance of the C-100 canal.

16. The fence that Respondent erected pursuant to Permit 9591 blocks the District's access to the easement area. Consequently, it is found that the District has cause to revoke Permit 9591 as it pertains to the fence. The District's easement entitles it to unobstructed access to the easement area and provides the District with the authority it needs to demand that Respondent remove the fence. The District established that it has cause to demand that Respondent remove the fence from the easement area.

17. Respondent also disputes that the two live oak trees and the key lime tree that are in the easement area need to be removed even if it is found necessary to remove the fence. In their present condition, the three trees, especially the two oaks, obstruct a major portion of the easement area and interfere with the District's intended use of the easement area. Even if the trees are pruned as they grow to maturity, they will significantly interfere with the District's intended use of the easement. The bases of the oak trees are approximately 2.5' and 6.5', respectively, from Respondent's rear property line within the easement area. The two oaks are approximately the same size and are expected to grow to maturity at the same rate. At the time of the formal hearing, the canopies of the trees were approximately 20' tall and 10' wide. In five years, the canopies are expected to be approximately 25' tall and 25' wide. In ten years, the canopies are expected to be 30' tall and 30' wide. At maturity, the canopies are expected to be 35' tall and 40' wide. The District has cause to revoke Permit 9591 as it pertains to the two oak trees. The District also has cause to demand that Respondent remove the two oak trees from the easement area. The instrument granting the District the maintenance easement provides the District with the authority it needs to demand that Respondent remove the two oak trees.

18. The base of the key lime tree is approximately 10' from Respondent's rear property line within the easement area. Although this is a relatively small tree, its presence obstructs the operation of equipment within the easement area. At maturity the canopy of the key lime tree is expected to be between 12 to 15' in height and between 12 and 15' in width. The tree trunks and the tree canopies obstruct the operation of equipment within the easement area. This interference cannot be resolved by pruning the trees.

19. The District has cause to demand that Respondent remove the key lime tree that he planted on the easement area since that tree was not permitted by Permit 9591 and is contrary to limiting condition 7(c). The existence of the

key lime tree is found to interfere with the District's intended use of the easement. The instrument granting the District the maintenance easement provides the District with the authority it needs to demand that Respondent remove the two oak trees.

#### CONCLUSIONS OF LAW

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

21. Section 373.016, Florida Statutes, declare certain policies pertinent to this proceeding, as follows:

(1) The waters in the state are among its basic resources. Such waters have not heretofore been conserved or fully controlled so as to realize their full beneficial use.

(2) It is further declared to be the policy of the Legislature:

(a) To provide for the management of water and related land resources;

(b) To promote the conservation, development, and proper utilization of surface and ground water.

(c) To develop and regulate dams, impoundments, reservoirs, and other works and to provide water storage for beneficial purposes;

(d) To prevent damage from floods, soil erosion, and excessive drainage;

(e) To minimize degradation of water resources caused by the discharge of stormwater . . .

22. Section 373.086(1), Florida Statutes, provides the authority for the governing board of a water management district, in pertinent part, as follows:

(1) In order to carry out the works for the district, and for effectuating the purposes of this chapter, the governing board is authorized to . . . hold, control, and acquire by donation, lease, or purchase, or to condemn any land, public or private, needed for rights-of-way or other purposes, and may remove any building or other obstruction necessary for the construction, maintenance, and operation of the works; and to hold and have full control over the works and rights-of-way of the district.

23. The burden is on the District to establish by a preponderance of the evidence that it has the authority to take the action it is attempting to take and that it has cause to exercise that authority. In this proceeding, the District established that Permit 9591 is revocable and that it has cause to exercise its discretionary right to revoke the permit. The revocation of Permit 9591 furthers policies set forth in Section 373.016, Florida Statutes.

24. Pursuant to the terms of the permit and to the rights conferred by the grant of easement in 1964, the District is entitled to unrestricted access to the entire easement. See, *Hoff v. Scott*, 453 So.2d 224 (Fla. 5th DCA 1984),

Anderson v. Oldham, 622 So.2d 544 (Fla. 5th DCA 1993), and White Sands, Inc. v. Sea Club Condominium Association, 581 So.2d 589 (Fla. 2nd DCA 1990). Consequently, the District has the authority to demand that the Respondent remove the fence, the two oak trees, and the key lime tree. The District established that it has good cause to make that demand.

25. The evidence is clear that the District is not acting in an arbitrary or capricious fashion in exercising its authority to revoke Permit 9591 or in demanding that the fence and the three trees be removed from the easement area.

#### RECOMMENDATION

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

RECOMMENDED that the District enter a final order that revokes Permit 9591 and demands that Respondent remove the fence, the two oak trees, and the key lime tree from the easement area within thirty days from the date the final order becomes final.

DONE AND ENTERED this 6th day of July, 1995, in Tallahassee, Leon County, Florida.

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CLAUDE B. ARRINGTON  
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 6th day of July, 1995.

#### APPENDIX TO RECOMMENDED ORDER, CASE NO. 95-0049

The following rulings are made on the proposed findings of fact submitted by the Petitioner.

1. The proposed findings of fact in paragraphs 1, 2, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 30, 31, 36, 37, 38, 39, 40, and 45 are adopted in material part by the Recommended Order.

2. The proposed findings of fact in paragraphs 3, 8, 28, 29, 41, 42, 43, and 44 are subordinate to the findings made.

3. The proposed findings of fact in paragraph 9 are adopted in part by the Recommended Order, but are rejected to the extent they are unsubstantiated by the evidence.

4. The proposed findings of fact in paragraphs 23 and 24 are rejected as being unnecessary to the conclusions reached.

5. The proposed findings of fact in paragraphs 26 and 27 are incorporated as preliminary matters, but are rejected as findings of fact because they are unnecessary to the conclusions reached.



6. The proposed findings of fact in paragraphs 32, 33, 34, and 35 are adopted in part by the Recommended Order, but are rejected to the extent the proposed findings of fact are unnecessary to the conclusions reached.

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 ten 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.