STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GARDEN VILLAS HOMEOWNERS' ASSOCIATION,	)	
Petitioner,	)	
vs.	)	CASE NO. 95-102
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before P. Michael Ruff, duly-designated Hearing Officer of the Division of Administrative Hearings, on August 24, 1995, in Shalimar, Florida.

APPEARANCES

For Petitioner: Mr. Lawrence Sidel, pro se
219 Carmel Drive, Number 33
Fort Walton Beach, Florida 32547-1961

For Respondent: Richard L. Windsor, Esquire
Department of Environmental Protection
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

STATEMENT OF THE ISSUES

The issue to be resolved in this proceeding concerns whether the Consent Order proposed to be entered between Whitrock Associates, Inc. and the State of Florida, Department of Environmental Protection (DEP) is reasonable under the circumstances raised in the proceeding herein. Embodied within that general issue are the issues raised by the Petitioner, who is attacking the Consent Order, concerning illegal dumping at the site, failure to post a guard at the site, improper fencing, and the allegation that the site (a construction and demolition debris disposal facility) is in an area for which it is not zoned. The Petitioner also complains of declining property values of the homes in close proximity to the site, increased noise, dust in the air, increased vermin, visual blight and destruction of a stocked fishing lake.

PRELIMINARY STATEMENT

This cause arose upon the agreement by DEP and Whitrock Associates, Inc. to a Consent Order resolving an enforcement proceeding. Their disputes revolved around the management of a construction and demolition debris disposal facility. The Consent Order directs the Respondent to provide DEP with notification of intent to use a "general permit" for a construction and demolition debris

disposal facility for the facility in question. Upon failing to so qualify for and obtain a general permit, DEP, under the provisions of the Consent Order, will close the facility within 180 days of the effective date of the Consent Order.

The dispute arose when, upon advice and inspection, DEP personnel learned that the Respondent had disposed of construction and demolition debris in the water body (exposed ground water) in a pit at the facility. This was not inert construction and demolition debris but, rather, was organic debris in the nature of lumber, discarded shingles, and the like. The general permit and the regulations in Chapter 62-701, Florida Administrative Code, governing such facilities, provide that construction and demolition debris disposal facilities cannot accept such non-inert, organic construction and demolition debris. Consequently, the Consent Order provides that the material wrongfully disposed of be removed from the facility and that the Respondent pay DEP $2,300.00 in financial settlement of the matters addressed in the Consent Order. This includes an amount for civil penalties for violation of Section 403.161, Florida Statutes, and DEP's rules embodied in Chapter 62-701, Florida Administrative Code, and for costs and expenses incurred during the investigation and preparation of the enforcement action culminating in the Consent Order.

The Consent Order provides penalties for failure to comply with it within certain time limits and for assessment of separate penalties for each violation of the Consent Order. In general, it provides detailed procedures for the owner of the facility to accomplish compliance with the terms of the Consent Order. The Consent Order also affords a point of entry for a Section 120.57(1), Florida Statutes, proceeding, of which the Petitioner has taken advantage. It has raised the issues referenced above, taken from the Petition filed in this matter.

The cause came on for hearing as noticed. At the hearing, DEP, Respondent, presented the testimony of Billy Ross Mitchell, an Environmental Specialist with DEP, involved in the solid-waste regulation section, with some 14 years of experience. Additionally, the Respondent presented four exhibits, which were admitted into evidence.

The Petitioner presented the testimony of Lawrence Sidel, Vice President and "acting counsel" for the Petitioner and Don Bragg, President of the Petitioner. Eddie Phillips, Owen Karr, Robert Hartley, and Erma Mahler, unit owners in the Garden Villas Homeowners' Association, a development proximate to the construction and demolition debris disposal site at issue, testified as well.

Upon conclusion of the proceeding, the parties were afforded an extended briefing schedule to submit proposed findings of fact and conclusions of law. They requested and were allowed to submit these 30 days after the filing of the transcript in this matter. Some months elapsed and no transcript was yet filed. Upon inquiry by the Hearing Officer, counsel for the DEP advised that a transcript would be filed and a Proposed Recommended Order would thereafter be timely filed. The transcript was received, but ultimately, on November 3, 1995, the Hearing Officer received advice, by counsel for DEP, that it had elected not to submit a Proposed Recommended Order. None was submitted by the Petitioner.

FINDINGS OF FACT

1. The Petitioner is comprised of residents of the residential neighborhood in close proximity to the construction and demolition debris

disposal site or pit maintained by Whitrock Associates, Inc.. Its President is Jim Whitfield, a party Respondent to the subject Consent Order. The Petitioner complains that illegal dumping is occurring at the disposal site, that there is no guard maintained at the gate, and that the gate is not locked when no one is present. It complains that DEP does not inspect the facility enough by only inspecting it once per year and that the facility should be closed down. Its chief objections are that refuse is being dumped in what it considers to be a stocked fishing lake. The "lake" is a borrow pit partially filled with water, which resulted when excavation of the dirt in the pit penetrated below the ground water table. The chief objections raised by the Petitioner amount to the nuisance "eye-sore" nature of the facility and the concomitant deleterious effect its presence and activity has arguably had on property values and the Petitioner's members' ability to re-sell homes. The Petitioner's standing is not contested.

2. The Respondent is an agency of the State of Florida charged with regulating landfills, construction and demolition debris disposal sites and other such waste sites, within the purview of Section 403.161, Florida Statutes, concerning pollution discharge and, more specifically, rules contained in Chapter 62-701, Florida Administrative Code, concerning solid waste and similar materials and disposal facilities. DEP is a party Respondent to this proceeding because the Consent Order it has entered into with the owner and operator of the site, Whitrock Associates, Inc., has been challenged, within the point of entry period afforded by that Consent Order, by the above-named Petitioner.

3. Whitrock Associates, Inc. maintains a construction and demolition debris disposal site, in the form of an excavated pit, located between Carmel Drive and Vicky Leigh Road in Fort Walton Beach, Okaloosa County, Florida. An inspection of the facility by DEP personnel on October 13, 1994 revealed the disposal of organic debris in surface water at the site, the disposal of which is illegal in ground or surface waters. It also came to DEP's attention at this time that the facility was operating with an expired general permit. Consequently, an enforcement action was initiated against the owner and operator of the facility. After extensive negotiations, the subject Consent Order resulted, which has been challenged by the Petitioner.

4. The essential provisions of the Consent Order would require that the Respondent to it, meaning Whitrock Associates, Inc., cease disposal of construction and demolition debris at the facility, which is not "clean debris". "Clean debris" is inert debris, such as brick, glass, ceramics, and uncontaminated concrete, including embedded pipe or steel. The Consent Order provides that within 60 days of its effective date, all such non-conforming construction and demolition debris shall be removed from the water at the site and that the Respondent, Whitrock Associates, Inc., shall submit a notification of intent to use a general permit for the construction and demolition debris disposal facility to DEP. Failure to proceed to obtain the general permit would result in closure of the facility, pursuant to Rule 62-701.803(10), Florida Administrative Code. The Consent Order also provides that a $2,300.00 civil penalty and cost payment shall be made to DEP in full settlement of the matters addressed in the Consent Order. That payment shall be made within 30 days of the effective date of the Consent Order. The Consent Order then enunciates, in great detail, the manner in which future penalties will be assessed for any violation of the Consent Order and related time limits, as well as payment methods and circumstances. It also provides a means for handling of delays in compliance with the Consent Order. It provides the means for enforcement of the terms of the Consent Order.

5. Billy Ross Mitchell is an Environmental Specialist with 14 years of experience with DEP. He works in the solid waste section. Among his other duties, he inspects solid waste disposal facilities. He has a degree in environmental resource management.

6. Mr. Mitchell established that this is the type of facility, where, because of the disposal of inert construction debris, which does not pose a significant pollution threat, a so-called "general permit" is sufficient authorization for operation of the facility. The facility was operating with an expired general permit at the time of Mr. Mitchell's inspection, but a new general permit has since been authorized. Mr. Mitchell performed the inspection of the facility, at which he observed illegal construction debris being placed in the water at the site. DEP's rules allow inert material, such as brick, glass, ceramics, and so forth to be placed in water at the site, which, in essence, is a borrow pit. The rules forbid organic materials, such as shingles, lumber and other similar materials, which can sometimes be constituted of pollutant substances, from being placed in the surface or ground water.

7. As shown by the Respondent's Exhibit 3, a letter from Mr. Cooley, a District Director of DEP, to Mr. Lawrence Sidel of the Petitioner, uncontaminated dirt and "clean debris", such as chunks of concrete and the like, are not considered under Florida law to be solid waste. DEP takes the position that there is no prohibition against a person using clean fill, without a required permit, to fill land or bodies of water that are not "state jurisdictional water." The water body on the Whitrock property is not a state jurisdictional lake or water body. It is an old borrow pit, wholly contained on the Whitrock property. State law allows its owners to fill it with dirt or clean fill. Whitrock is not allowed to use any material classified as "solid waste" in filling the pit, hence the violation cited to that firm in the particular mentioned above, concerning the non-inert construction debris that was placed in the water.

8. The Respondent's Exhibit 4 is an engineer's report prepared for the Whitrock facility involving the "notification of proposed use of a general permit" process for the operation of the construction and demolition debris disposal facility. This is the general permit notification process and general permit referenced in the Consent Order. 1/

9. The site has been used for many years as a borrow pit for dirt fill material or sand, as well as a disposal site for construction debris. In the general permit achievement process, the owner proposes to grade the site so that the final grade is the original, natural grade, with a slight two percent top slope to promote runoff to surrounding retention swales which will be installed at the site. The soil borings reflect that at all depths tested, sand is the underlying soil at the site. The borrow pit has been excavated below the natural water table, which has resulted in ponding of water on the floor of the borrow pit. This is proposed to be filled with "clean" debris, as it is received on site. Clean debris is solid waste which is virtually inert and which poses no pollution threat to ground or surface waters, is not a fire hazard, and is likely to retain its physical and chemical structure under expected conditions of disposal or use. Examples of it are as depicted in paragraphs six and seven, supra. Clean debris disposal is thus proposed within the pit bottom to an elevation of one foot above water table, above which construction and demolition debris will be disposed.

10. The owner of the facility will be the person responsible for operation, maintenance, and closure of the proposed disposal facility.

Procedures will be followed to control the types of waste received, the unloading, compaction, application of cover, final cover, and control of storm water at the site. The existing perimeter fence will remain with a lockable gate at the entrance to the site.

11. In accordance with Rule 62-701.803(8), Florida Administrative Code, at least one spotter/operator will be on duty when the site is operating to inspect incoming waste. If prohibited waste is discovered, it will be separated from the waste stream and placed in appropriate containers for disposal at a properly-permitted facility. A commercial dumpster is located on site for unpermitted waste and is regularly emptied by a sanitation contractor. This practice is proposed to continue with the issuance of the general permit for the construction and demolition debris facility. Construction and demolition debris filling operations will proceed from the northwest corner of the site and progress in an easterly direction along the north property fence line. Due to the depth of the existing cut, approximately 25 feet, it will take approximately three separate "lifts" of waste and compacted material in order to reach a finished grade elevation, to match the original grade of the surrounding terrain. Additional soils required for intermediate cover material and final cover will be obtained off site from other sources. Filling operations should allow for approximately a 100-foot wide working face to aide in keeping a manageable disposal area. A dozer and front-end loader will be available on the site to compact waste material into the "working face." Each lift will be six to eight feet thick.

12. Closure of each portion of the facility will occur as waste compaction approaches original grade. Final cover, seeding or planting of vegetated cover will be placed during stages, within 180 days after reaching final-design waste elevations. The final cover will consist of a 24-inch thick soil layer, with the top six inches being capable of supporting vegetation. The site shall be graded to eliminate ponding, while minimizing erosion. Upon final cover placement across the site, the owner will notify DEP within 30 days.

13. Storm water will be controlled via retention swales surrounding the site. The swales are sized to accommodate one-half inch volume across the site.

14. These specifications are those proposed to be installed and operated at the site in return for the grant of the general permit and are necessary elements of the negotiations and ultimate settlement agreement reached embodied in the Consent Order. Thus, they are required by the Consent Order, should it become final agency action.

15. Chief among the Petitioner's concerns is the matter of the alleged non-compliance of the disposal site and facility with zoning for that area and land-use ordinances, as well as concerns regarding property values, tax assessments and the inherent difficulty in re-sale of homes caused by the presence and operation of the facility. 2/ The Petitioner, whose members, among others, are a number of adjoining landowners, some of whom testified, also complains of pollution of the water body involved, the standing water in the bottom of the borrow pit. Witness Mitchell, as well as Respondent's Exhibit 4, concerning the conditions under which the general permit will be obtained and operated (conditions also repeated in the Consent Order), established that the deposition of only construction and demolition debris and clean fill in the water will pose no pollution which violates Section 403.161, Florida Statutes, and attendant rules.

16. The terms in the Consent Order, which require the general permit and the conditions referenced in the Respondent's Exhibit 4, concerning the general permit, will result in minimal hazards of pollutants entering surface or ground waters, or in polluted air or water emanating from the site in violation of regulatory strictures, assuming frequent inspections by DEP are made to insure compliance. Thus, it has been established that the proposed Consent Order is reasonable under the circumstances. 3/

CONCLUSIONS OF LAW

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

18. This is a case initiated by third-party challengers (Petitioner) to the terms of a Consent Order entered into between DEP and the owner and operator of the subject facility. In essence, the Consent Order amounts to a formalized settlement agreement, with the Petitioner taking advantage of the point of entry afforded them in that Consent Order and in Section 120.57(1), Florida Statutes, to contest its terms.

19. There are two types of consent orders. One, in reality, amounts to a licensing or authorization for permitting, in the typical situation where DEP has discovered that a certain type of activity is proceeding or about to proceed, which should be permitted, but which is not the subject of a permit application. After negotiation, the parties in such a situation typically enter into an agreed settlement, culminating in a consent order, which will result in permitting the type of activity involved. The second type of consent order is one issued by DEP through an enforcement action, to resolve an alleged violation of a statute or rule. The issues which may be raised by parties challenging a consent order and the level and assignment of burden of proof vary, depending on which type of consent order the forum and the parties are confronted with. Thus, the consideration of level and assignment of burden of proof, as well the germane legal issues concerning the Consent Order at hand, is in order.

20. The case of Sarasota County v. State of Florida, Department of Environmental Regulation and Ronald W. Falconer, DOAH Case No. 86-2463 (Final Order entered March 8, 1987), provides some illumination in this area. In that case, the Department determined that there are two classes of consent orders issued by the Department:

> The first class of consent order serves as authorization for a permittable type of activity that has not yet been conducted or is ongoing in nature and is the type of activity more properly the subject of the permit application. . . . The second class of consent order is issued by the Department to resolve an alleged violation of statutes or rule resulting from a facility being constructed without a permit or from a facility causing pollution that must be ameliorated or both. Consent orders of this class are issued to settle existing outstanding violations of law and may require any or all of the following as the specific circumstances of each case dictate: payment

of penalties, reimbursement of Department costs, payment of damages to the environment, or remedial action.

When a hearing is requested on a consent order of the first class, the burden of proof is on the respondent desiring to conduct or continue the authorized activity as in the permit proceeding. In other words, the respondent must demonstrate entitlement to the authorization by providing reasonable assurances that the criteria in Chapter 403, Florida Statutes, and Department rules have been met. When the challenged consent order is a vehicle for resolving existing violations of law, however, the Department and the settling party must prove not reasonable assurance, but reasonableness of the consent order.

When a consent order allows a project built without a permit to remain, the threshold question in determining the reasonableness of the consent order is whether the project would have been entitled to a permit had the respondent applied for one. If the respondent or the Department can carry the burden of proving that a permit could have been obtained based upon the reasonable assurance standard, an entry of a consent authorizing the project to remain is per se reasonable. Although the Department, in the exercise of its enforcement discretion, may find it appropriate to impose additional requirements, such as imposition of penalties, recovery of costs, or even removal of the installation, those other requirements are not the proper subject of review by third parties in a Section 120.57(1), proceeding, since they do not affect the substantial interests of the third parties. Those interests are limited to the environmental impacts of the projects themselves. If the project would not have been entitled to a permit, however, inquiry as to the appropriateness of the consent order may be the subject of Section 120.57(1) review. That review then focuses on whether the action taken by the Department is a reasonable exercise of its enforcement discretion. Factors such as the nature of the violation, the sufficiency of any penalty, the availability of Department resources, Department enforcement priorities, and the harm that might result from restoration would then be considered in determining the reasonableness of the Department's settlement. The Department must have discretion in the allocation of its enforcement resources, because every violation cannot and should not be treated equally. Unless a third party challenger can

> show that discretion has been abused, its exercise should not be disturbed. . . . Consent orders which settle existing violations of law and allow unpermitted structures to remain are more in the nature of settlement agreements than licenses. Licensing considerations and constraints are important in evaluating the reasonableness of such consent orders, but only under limited circumstances are they absolutely determinative.

21. The Consent Order with which we are confronted in this proceeding is of the latter type, which is an enforcement action culminating in a consent order which settles existing violations of law and which allows a previously un-permitted structure (or site) to remain in operation under certain conditions. The site was previously un-permitted in the sense that the previously authorized general permit had expired. One of the conditions in the subject Consent Order required by DEP is that appropriate steps and measures (represented by the engineering report contained in Respondent's Exhibit 4 in evidence) be taken to insure that a general permit was re-authorized. That has been done and as shown by witness Mitchell for DEP, the new general permit has already been authorized and is not the subject of litigation in this proceeding.

22. In any event, general permits are granted administratively, if the requirements for them are met, and are not the subject of opportunities for third parties to challenge, under Section 120.57(1), Florida Statutes. Because this Consent Order and the activity and negotiations it represents does not really amount to a permitting in the traditional sense, where a permit applicant must demonstrate reasonable assurances that water quality and public interest standards are not violated, then licensing considerations involving proof to the standard of reasonable assurances are not binding. Rather, they can be used as guidance in evaluating the reasonableness of the enforcement-type Consent Order at issue in this case.

23. In that connection, unrefuted testimony adduced by DEP shows that if the conditions enumerated in the Consent Order are carried out and the offending pollutant material is removed from the borrow pit area, then the water quality and public interest standards embodied in Sections 403.913, 918 and 919, Florida Statutes, and Chapters 62-3, 62-302, and Rule 62-701.803, Florida Administrative Code, would not be violated. This eventuality tends to support the reasonableness of the enforcement action and resolution advanced by DEP's position in the Consent Order. Moreover, under the relevant solid waste permitting rules embodied in 62-701.730 and 62-701.803, Florida Administrative Code, the activity conducted previously, and proposed to be continued, involves only the disposal of construction and demolition debris. This does not require a solid waste permit under these rules but, rather, is in the category of an administratively granted "general permit" activity or installation. DEP's evidence establishes that the requirements for such a permit have been met, and the general permit has already been authorized.

24. The point here is that, even if the air and water quality and public interest protections, contained in the above-cited statutes and rules, incorporated in the solid waste permitting rules at 62-701.803, Florida Administrative Code, were applicable here, they would not be violated by the activities proposed to be conducted and continued at the site. This is so if the terms of the Consent Order are carried out. These factors and considerations thus show that the terms and ameliorative steps advanced by the Consent Order are reasonable under the circumstances and should be approved.

25. The Petitioner decries the nuisance nature of the facility and the activities conducted there in terms of its being an eyesore, having a deleterious effect on the property values and the marketability of the members' properties. The Petitioner contends that the facility violates local government zoning ordinances. It has thus raised issues which are not within the Department's or the Division of Administrative Hearings' jurisdiction, under the statutory and regulatory authorization for this proceeding, contained in Chapter 403, Florida Statutes, the rules enacted thereunder and Chapter 120, Florida Statutes. Zoning issues and nuisance-type issues are within the jurisdiction of local government bodies and the civil court system, not the administrative forum involved in the conduct of this proceeding.

26. Aside from that, the Petitioner's arguments and testimony do not raise any support for fact finding which would show that air or water quality standards have been or will be violated by the continued operation of the subject site in accordance with the restrictions imposed by the Consent Order. It has not been shown that the public interest standards embodied in the above-cited legal authority, which are the only ones DEP and, therefore, the Division of Administrative Hearings are allowed to consider, will be violated by a continuation of the activity as proposed in the Consent Order. Thus, it has not been shown that the Consent Order is unreasonable under the above circumstances.

27. In summary, the preponderant evidence culminating in the above Findings of Fact shows that the Consent Order, with the conditions and restrictions it would impose, including the potential closing of the facility if the provisions of the Consent Order are not carried out by Whitrock Associates, Inc., is reasonable under the circumstances proven. If at any point the Petitioner or DEP observe that the standards by which the general permit is issued and which are embodied in the Consent Order have been violated, then an appropriate enforcement action could be instituted by DEP on its own motion or at the behest of the Petitioner or others similarly situated.

RECOMMENDATION

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

RECOMMENDED that the Consent Order issued in the case of State of Florida, Department of Environmental Protection v. Whitrock Associates, Inc. be ratified and adopted as final agency action, in accordance with Chapter 120, Florida Statutes.

DONE AND ENTERED this 16th day of January, 1996, in Tallahassee, Florida.

P. MICHAEL RUFF, 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 22nd day of January, 1996.

ENDNOTES

1/ Rule 62-701.803, Florida Administrative Code.

2/ While this activity and site, which the Petitioner considers to be a nuisance, is upsetting to the Petitioner, and it is concerned about such an effect on the property values and the marketability of the properties, such complaints cannot be addressed before this administrative forum. They are addressable, if at all, before local government bodies or a court of competent jurisdiction.

3/ See, Sarasota County v. State of Florida, Department of Environmental Regulation and Ronald W. Falconer, 9 FALR 1822 (Final Order entered March 5, 1987).

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit to the agency 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.