

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

J. O. STONE as trustee of the)	
J. O. Stone Revocable Trust)	
dated 9/26/78,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 96-2753
)	
DEPARTMENT OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

A hearing was held in this case in Tallahassee, Florida on December 11, 1996, before Arnold H. Pollock, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles F. Barber, Esquire
Alford, Barber and Mariani
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For Respondent: Francine M. Ffolkes, Esquire
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STATEMENT OF THE ISSUE

The issue for consideration in this case is whether Petitioner should be granted an access permit free from the drainage permitting requirements of Chapter 14-86, Florida

Administrative Code, or whether the terms and conditions proposed in the Notice of Intent to Issue should be required for project number 94-A-799-0019, located on the southwest corner of the intersection of U.S. Highway 19 and State Road 686 in Pinellas County, Florida.

PRELIMINARY STATEMENT

By Notice of Intent To Issue Permit dated February 28, 1996, the Department of Transportation notified Petitioner, J. O. Stone, Trustee of the J. O. Stone Revocable Trust dated September 26, 1978, that it intended to issue the access connection permit for the project described above, subject to denial of the applicant's request for an exemption to the Department's requirement for a drainage connection permit which, according to the Department's interpretation of Rule 14-86.003(2), Florida Administrative Code, was required for the project. Thereafter, by letter dated March 26, 1996, Petitioner requested formal hearing on the denial of the exemption, and this hearing ensued.

At the hearing, Petitioner presented the testimony of Sandy Lloveras, Michael Scott Lloveras and Thomas G. Radcliffe, all professional engineers, and introduced Petitioner's Exhibits One through Twelve. Respondent presented the testimony of Juan Carlos Lopez-Paniagua, District Engineer for the relevant Department District and an expert in civil engineering with an emphasis in hydrology and hydraulics. The Department did not offer or introduce any exhibits.

A transcript of the proceedings was furnished. Subsequent to the receipt thereof, counsel for both parties submitted Proposed Findings of Fact and written argument which have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to the issues herein, the Department of Transportation has been the state agency responsible for the issuance of access connection permits for the access to and from property to the roads maintained by the State of Florida. It is also responsible for the promulgation and enforcement of rules governing the application for an issuance of drainage connection permits regarding those roads and properties.

2. Petitioner, J. O. Stone, as Trustee of the J. O. Stone Revocable trust dated 9/26/78, owns and proposes to develop a parcel of property located on the southwest corner of the intersection of US Highway 19 and State Road 686, (East Bay Drive), in Pinellas County, Florida. The property in question is a piece of commercial land approximately six acres in area.

3. In September 1994, Petitioner applied to the Department for an access management permit to allow proposed commercial establishments proposed to be built on that property to be connected to the state highway system. The development proposal called for construction of two restaurants and parking sufficient to support them.

4. The property in issue was previously occupied by restaurants, a gasoline station and business facilities which had access to the abutting roads. Petitioner purchased the property more than twenty-five years ago and it is now vacant land.

5. Petitioner did not seek a drainage connection permit at the time he requested the access management permit, and resists seeking one now because he believes the project in issue is exempt from the requirement for such a drainage connection permit. In fact, at the same time the Petitioner submitted his access connection permit request, he also submitted a formal request in writing to the Department requesting a confirmation of exemption from the drainage permit criteria under Chapter 14-86. The Department never acted on this secondary request until it included the requirement for a drainage permit as a condition of the access permit intent to issue. By virtue of its preparation of an intent to issue, with conditions, the Department, Petitioner claims, has indicated its intention to issue the requested access management permit conditioned upon the application for an approval of the drainage connection permit.

6. There is some evidence that Petitioner's staff was advised by Department officials that under the Department's interpretation of the pertinent rules, the project does not meet all three criteria for exemption outlined in the pertinent rule, but at no time, according to Petitioner, was he ever given any

specifics regarding how the Department considers the relevant criteria are not met by his proposal.

7. The property is bordered on the east by the Department's right-of-way for US Highway 19, and on the north by the right-of-way for State Road 686. On the west and south the property is bordered by a branch of Long Branch Creek Channel 2, which flows generally to the northeast to Highway 19, through a box culvert under that highway, and then, variably, southeast, east and northeast until it empties into Tampa Bay.

8. The September 1994 application calls for the construction of three driveways from and to the property for restaurant development. Two of the driveways would connect with State Road 686, (the western access would be for right out traffic only and the eastern one would be for right in traffic only), and one would connect with U.S. Highway 19. This latter connection would be for both in and out traffic. Though the original application was accompanied by a request for an exemption from the requirement for a drainage connection permit, no mention was made regarding this ancillary issue during any of the parties' negotiations and discussions until just before the issuance of the notice of intent.

9. Consistent with his application for access management permit from the Department, Petitioner also sought required permits from other entities such as the Southwest Florida Water

Management District, and Pinellas County. These permits have been granted.

10. In November 1995, Petitioner received a letter from the Department which indicated that after review by its drainage staff, a determination was made that the proposed project was not exempt from the requirement for a drainage connection permit. This determination was made on the basis of the Department's interpretation of the provisions of the pertinent rule that was different from that of the Petitioner. There appeared then, and appears now, to be no dispute regarding the underlying facts of the case.

11. Chapter 14-86(1)(c), Florida Administrative Code, lists three criteria for granting an exemption, all of which must be met to permit the issuance of an exemption from the requirements for a drainage access permit.

12. The first of these provides that no more than 5,000 feet of impervious area may drain to the property in the pre-developed condition. With a small exception, this property drains away from the Departments right-of-way, so Petitioner contends his project meets that criteria.

13. The second prohibits any work within the right-of-way that will create or alter a drainage connection, and Petitioner contends that since the only work to be done within the right-of-way area is the installation of the three driveways, the project also meets that criteria as well. The third requirement is that

the property be located in a watershed which has a positive outfall. Since this property is located in the Long Branch Creek basin, which outfalls to Tampa Bay and the Gulf of Mexico, Petitioner contends it meets that criteria as well, thereby qualifying the project for the exemption.

14. A survey of the property made in 1995 indicated that with the minor exception of approximately 1,000 or so square feet of paved area in the extreme northeast corner of the parcel, which constitutes a portion of the State's road construction, all of the natural drainage on the property is from the northeast to the southwest or west, directly away from the State's right-of-way. Planned near-term development of the parcel calls for the approximate northern half to be used for the construction of two restaurants and related parking. The two-way access onto the U.S. Highway 19 right-of-way is to be located at the southern end of the parking lots, approximately half way down the property. In the southern half of the property, more to the west, Petitioner proposed to construct a 12,000 square foot holding pond.

15. Communications between Petitioner and the Department show that the Department understands that the property drains into the Long Branch creek Channel Two but has taken the position that the holding pond will also drain in the channel which ultimately, approximately 285 feet downstream from the drainage connection, crosses the state right-of-way and through the box

culvert under U.S. Highway 19. The Department considers this a connection discharge which requires a permit, and Petitioner considers it to be a situation which qualifies for an exemption from the permitting requirements.

16. This issue first became a matter for discussion between the parties in November 1995. By letter dated December 8, 1995, the Department advised Petitioner that the link-up described disqualifies the project from an exemption. A meeting of the parties was subsequently held in January 1996, at which Petitioner provided additional calculations and evidence of other similar situations where the agency did not require the drainage permit, but the Department remains adamant in its position.

17. In February 1996, the Department wrote to Petitioner restating its position and demanding the project include a drainage connection permit. On March 5, 1996, the Department issued its Notice of Intent with the condition that the Petitioner obtain a drainage connection permit prior to the issuance of the access connection permit. Petitioner cannot accept this condition, contending that the requirement for the drainage connection permit would have an unacceptable impact on the project.

18. Petitioner's major objection to the requirement for a drainage connection permit is financially based. As was previously noted, the project as currently proposed by Petitioner would call for a 12,000 square foot holding pond. When the

remainder of the property is developed according to plan, the holding pond will be increased to 18,000 square feet. However, under the criteria imposed by the Department for a drainage connection permit, the size of the holding pond to accommodate the proposed future development would require increase to 30,000 square feet, an increase of 12,000 square feet, (approximately $\frac{1}{4}$ acre), of prime commercial property which would not be available for productive development. No figures were provided to place a dollar value on that impact at current or future rates.

19. The Department's concerns which form the basis for the drainage connection permit requirement relate to protection of the state right-of-way and both downstream and upstream property owners from flooding due to excessive run-off. Petitioner argues that the Water Management District permitting criteria regarding run-off consider the situations most likely to occur. The Department admits that Petitioner has met the requirements of the Southwest Florida Water Management District, but notes that Department criteria are substantially different and are more stringent. Many more scenarios are considered by the Department than by the Water Management District.

20. The Department contends that while in the instant case the connection is not directly to the right-of-way, it nonetheless drains to a right-of-way, and the potential for flooding at the Department's right-of-way, as the result of

drainage from the property in question in the event of a major storm, justifies the permit requirements.

21. Mr. Radcliffe, a registered civil engineer employed by Petitioner's engineering design company, disputes the Department's concerns, asserting that the water flow increase in Long Branch Creek Channel Two at the box culvert under US Highway 19 from this project would peak well before the major flow from run-off upstream from the connection would get there. In his opinion, there is little chance that the instant project would have any impact on run-off to the state right-of-way. Therefore, little benefit would be obtained from applying the more stringent state requirement as opposed to the more liberal water management district criteria.

22. Mr. Lopez-Paniagua claims that Petitioner does not meet criteria number one, as outlined in Rule 14-86.003(1), Florida Administrative Code, because the project has about 12,000 square feet of impervious area. Petitioner, he asserts, has not proven to the Department's satisfaction that its drainage meets the criteria. Here, the project drains to a ditch at a point which is approximately 285 feet from the right-of-way for U.S. 19. It is Department policy to always review projects for drainage permit requirements, which projects are exempted if the review shows the project will not adversely affect the state highway system or the downstream property owners. Here, the Department contends, no such showing has been made.

CONCLUSIONS OF LAW

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

24. Under the provisions of Sections 331.1825(1) and 335.185(1), Florida Statutes, the Department of Transportation is authorized to require an access permit for construction of a connection to the State Highway System and may require any conditions reasonably necessary to carry out the conditions of the Access Management Act. Consistent therewith, the Department has promulgated Rule 14-86, Florida Administrative Code which, at 14-86.007(5) outlines the standard conditions which apply to all access connection permits. Included within this section is that provision which requires "compliance with drainage requirements in rule chapter 14-86, Florida Administrative Code", and the Department is charged to "provid[e] standards and procedures for drainage connections from the properties adjacent to the Department's right-of-way.

25. A drainage connection is defined in Rule 14-86.002(4), Florida Administrative Code as:

any structure, pipe, culvert, device, paved or unpaved area, swale, ditch, canal, or other feature whether natural or created, which is used or functions as a link or otherwise conveys stormwater runoff or other surface water discharge from the adjacent property to the Department's facility. A drainage connection is literally anything that stormwater can run on or through.

26. The evidence clearly establishes that Petitioner's property is located adjacent to the Department's right-of-way for U.S. Highway 19, and that Long Branch Channel Number Two is a natural feature of that property which conveys water to the box culverts in the right-of-way. In fact, the Department's evidence shows that in its existing condition, Channel Number Two brings the majority of the storm water which falls on Petitioner's property, along with other water originating both above and below Petitioner's property to the Department's right-of-way for U.S. Highway 19.

27. It is the Department's concern, that when the stormwater flow from the Petitioner's property is joined with that from properties above and below the Petitioner's property, it could, if not properly governed, create drainage problems in the U.S. 19 Right-of-way.

28. Petitioner bears the burden of proof to establish, by a preponderance of the evidence, that his project is entitled to the exemption. The testimony of Petitioner's experts, though impressive, was not shown to be based on any empirical data, and constitutes unsupported conclusory opinion. As such, it is not persuasive. Therefore, even though the water flow is not

directly to the adjacent right-of-way, in light of the fact that it ultimately ends up there, the first criteria for exemption is not met and the drainage connection permit application is required. The drainage through Channel No. Two to the right-of-way appears to be natural and not constructed. Therefore, that provision of the Department's drainage handbook which states that any project does not drain naturally onto the Department's right-of-way does not require a drainage connection permit is not applicable here.

29. To be sure, it would appear that to conform to the requirements established for a drainage connection permit, a significant portion of the Petitioner's remaining property would be lost to development. The resultant economic cost to Petitioner, while considerable, is not pertinent to the issue of the need for a drainage access permit.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department of Transportation enter a Final Order denying Petitioner's request for an exemption from the drainage connection permitting requirements of Chapter 14-86, Florida Administrative Code.

DONE and ENTERED this 30th day of January, 1997, in
Tallahassee, Florida.

ARNOLD H. POLLOCK

Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within fifteen days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.