

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD L. SILVANI; DICK W.)
THOMPSON; JAMES E. AND)
MARILYN BATES; JOYCE MENZIE;)
JAMES M. GIBSON; CLAUDIA C.)
MUNSELL; MR. AND MRS. PHILLIP)
E. DURST; DONALD R. SOSNOSHR;)
MR. AND MRS. ROBERT L.)
NELSON; and MRS. RICHARD)
LADOW,)
)
)
Petitioners,)
)
)
vs.) Case No. 97-5978
)
)
SOUTHWEST FLORIDA WATER)
MANAGEMENT DISTRICT and)
HERNANDO COUNTY,)
)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this matter was heard on March 17 and April 6, 1998, in Brooksville, Florida, by Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Chester L. Bradshaw
(Qualified Representative)
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Dade City, Florida 33523

For Petitioner: Richard L. Silvani, pro se
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Brooksville, Florida 34601

For Respondent: Margaret M. Lytle, Esquire
(SWFWMD) 2379 Broad Street

Brooksville, Florida 34609-6899

For Respondent: R. Bruce Snow, Esquire
(County) William Buztrey, Esquire
20 North Main Street, Room 462
Brooksville, Florida 34601

STATEMENT OF THE ISSUE

The issue is whether Hernando County's application for an environmental resource permit authorizing the construction of a new surface water management system to serve a 7.85 acre drainage system improvement three miles southeast of Brooksville, Florida, should be approved.

PRELIMINARY STATEMENT

This case began on September 29, 1997, when Respondent, Southwest Florida Water Management District, gave notice that it intended to issue an environmental resource permit to Respondent, Hernando County, authorizing the construction of a new surface water management system three miles southeast of Brooksville, Florida. Petitioners, Richard L. Silvani, Dick W. Thompson, James E. and Marilyn Bates, Joyce Menzie, James M. Gibson, Claudia C. Munsell, Mr. and Mrs. Phillip E. Durst, Donald R. Sosnosh, Mr. and Mrs. Robert L. Nelson, Mrs. Richard Ladow, and George Goff, all property owners in the area of the project, thereafter filed a Petition for Informal Hearing seeking to contest the proposed agency action. The petition generally contended that the permit application "contain[ed] possible miscalculations of design," which would exacerbate existing flood problems in a number of respects. The petition further alleged that the County lacked easements for surface water storage. The

petition was treated as a petition for a formal hearing and was referred by the agency to the Division of Administrative Hearings on December 23, 1997, with a request that an Administrative Law Judge be assigned to conduct a hearing. On February 26, 1998, George Goff filed a Notice of Withdrawal, in which he withdrew from participation in the case.

By Notice of Hearing dated February 14, 1998, a final hearing was scheduled on March 17, 1998, in Brooksville, Florida. A continued hearing was held on April 6, 1998, at the same location.

At final hearing, the agency's Motion in Limine and Motion That Facts be Taken as Established and For Other Relief were denied. All Petitioners except Richard L. Silvani were represented by Chester J. Bradshaw, a qualified representative, while Silvani represented himself. Petitioners presented the testimony of Chester J. Bradshaw, James M. Gibson, Dick W. Thompson, Marilyn Bates, Joyce Menzie, Jane Durst, Diane Nelson, Richard L. Silvani, and Julie Ann Defoe. Also, they offered Petitioners' Exhibit 1 and Silvani Exhibits 1 and 2. All exhibits were received in evidence. Hernando County presented the testimony of Charles D. Mixon, County Engineer and accepted as an expert in professional engineering; and Dale E. Cromwell, an engineering consultant and accepted as an expert in professional engineering. Also, it offered County Exhibits 1 and 2. Both exhibits were received in evidence. The Southwest

Florida Water Management District presented the testimony of C. Clay Black, a professional engineer and accepted as an expert in the design of surface water management systems and environmental resource permitting; and Julie Ann Defoe, an environmental scientist and accepted as an expert in wetlands and environmental resource permitting. Also, it offered District Exhibits 1-9. All exhibits were received in evidence.

The transcript of hearing (three volumes) was filed on April 24, 1998. By agreement of the parties, the time for filing proposed findings of fact and conclusions of law was extended to May 26, 1998. The same were jointly filed by Respondents, and they have been considered in the preparation of this Recommended Order. On May 28, 1998, Petitioners filed a document styled as "Petitioners' Summary Request to Deny Permit," together with copies of numerous documents apparently obtained from Respondents' public records. The "Summary Request to Deny Permit" has been treated as a proposed order and has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

A. Background

1. Petitioners, Richard J. Silvani, Dick W. Thompson, James E. and Marilyn Bates, Joyce Menzie, James M. Gibson, Claudia C. Munsell, Mr. and Mrs. Phillip E. Durst, Donald R.

Sosnoski, Mr. and Mrs. Robert L. Nelson, and Mr. and Mrs. Richard Ladow (Petitioners), are property owners in central Hernando County, Florida. Respondent, Southwest Florida Water Managment District (District), is the state agency charged with the responsibility of issuing Environmental Resource Permits (ERP) within its jurisdictional boundaries. Respondent, Hernando County (County), is a local government seeking the issuance of a permit for the purpose of alleviating drainage and flooding problems in a subdivision known as High Point Gardens in the central part of the County.

2. On June 11, 1997, the County filed an application with the District seeking authorization to construct a low earthen berm to help control flooding in High Point Gardens, an eighty-five unit residential subdivision. On September 29, 1997, the District gave notice of its intention to issue ERP No. 449342.01 authorizing the "construction of a new surface water management system to serve a 7.85 acre drainage system improvement known as the Hernando County - High Point Gardens Drainage Improvements." The project is located off Sun Hill Lane, three miles southeast of Brooksville, Florida, in central Hernando County.

3. On an undisclosed date, but in a timely fashion, Petitioners filed their Petition for Informal Hearing challenging the issuance of the permit. As grounds, Petitioners alleged that the permit application contained "possible miscalculations of design" which would "alter the natural water flow route";

"adversely affect several acres of natural wetlands by changing hydrology of surface area"; "adversely affect adjacent uplands by innundating forest areas never before flooded by heavy rainfall"; "not guarantee 100% flood protection to the few affected homes"; and "create flood problems to adjacent homes and property by diverting stormwater from natural flow (north) to area east of 'proposed' retention area." The petition further alleged that the "'proposed' area should not be normal receipient [sic] of excess water from Cedar Falls subdivision" and that "all affected properties are not owned or easements acquired by Hernando County for surface water storage." The filing of the petition prompted the initiation of this proceeding.

B. The Permit

4. The High Point Gardens subdivision, which lies within the Bystre Lake Basin, is a "relatively old subdivision," having been built around the 1970's. There is a low area in the middle of the subdivision, and it has "[s]everal sinks with a natural drainage within the area." Because the thirty-square-mile basin is a closed drainage basin, with no natural outflows, "significant" flooding problems have been present throughout the basin since at least the 1980's.

5. In an effort to resolve flooding problems within the basin, the County and District jointly sanctioned a study by a consulting firm, Dames and Moore, to provide suggested alternative actions to correct the problem. The firm's first

interim report was rendered on August 5, 1988, and a final report known as the Bystre Lake Stormwater Management Master Plan was rendered in August 1989.

6. Among other things, the consultant's report recommended that a berm be constructed to relieve the flooding in the High Point Gardens' area. Acting on the report, the County obtained a construction permit from the District in August 1991 in accordance with the consultant's recommendation, but construction on the project was not commenced prior to the permit expiring in 1994. Although the consultant's report was the genesis for the first permit, the plans and specifications for the new berm have been modified by engineers after further study and review. It is noted that the total land area of the project will be less than 100 acres.

7. The High Point Gardens subdivision lies within sub-basin 304 of the basin. Under the new proposal, water which now comes into sub-basins 304 and 406 from sub-basins 305 and 306 will be stored in those latter sub-basins. The requested permit would authorize the County to construct a low earthen berm along the western side of sub-basin 406 and the southern boundary of sub-basin 304 to help control flooding in the subdivision. The proposed berm will range from one to five feet in height and extend some 3,250 feet, or approximately six-tenths of a mile. It will range from eight to ten feet in width with a side slope of 4 to 1.

8. The berm will impound water upstream of the berm to an elevation of 90.5 NGVD, which is 1.5 feet higher than the water would rise in the area under natural conditions. The water will be stored in two natural ponds which are now located in the project area. Once the water reaches an elevation of 90.5 NGVD, which will occur only during an event exceeding a 25-year storm event, three overflow structures will become operative and are designed to mimic the natural water flows of the area.

9. After the berm is constructed, all basins "downstream" of the berm, including sub-basins 304, 405, and 406, will have "significantly lower flood elevations than the 10, 25 and 100-year storm event." That is to say, existing flooding to the north and east of the proposed berm will be lessened. To the extent that additional impoundment of water behind the berm will occur, or flooding beyond the berm may occur during a 100-year storm event, the County will acquire easements from local property owners to store the additional water. Until the aquisition of land occurs, construction cannot begin.

10. There is one already disturbed wetland area near the proposed construction area. No mitigation is required, however, since the impact will be temporary and the area is expected to naturally revegetate itself. There will be no adverse impacts to fish, wildlife, or adjacent wetlands. Neither will the project create any other environmental concerns. While there will be some impact to upland trees caused by the impounded water, under

existing District rules, that impact cannot be used as a basis to deny the permit.

11. Based on generally accepted engineering principles, the project is capable of being effectively performed and can function as proposed. Also, the project can be effectively operated and maintained. The County has the resources to undertake the project in accordance with the terms and conditions of the permit.

12. The greater weight of credible and persuasive evidence supports a finding that the County has given reasonable assurances that all applicable criteria for the issuance of a permit have been met.

C. Petitioners' Objections

13. At hearing, Petitioners contended that the overflow structures for the berm would alter the natural flow of water, and increase the flow of water to the east of the proposed project, where several Petitioners reside. As previously noted, however, the more credible evidence shows that the project will not increase the natural flow of water to the east of the berm. More specifically, expert testimony demonstrated that the regular flow through each weir in the post-development condition will not be adversely greater than what occurred during the pre-development condition.

14. Petitioners also contended that the wetlands will be negatively impacted by the project. Contrary expert testimony by

witness Defoe established, however, that there will be no permanent adverse impacts to wetlands, fish, or wildlife if the permit is approved.

15. Petitioners next contended that the process was flawed because very few on-site inspections of the project area were made by District and County personnel, especially during the rainy season, before the application was preliminarily approved. There were, however, on-site inspections by District and County staff and consultants, and it was not shown that the lack of additional inspections affected the validity of their studies.

16. A further contention was made at hearing that the information supporting the application was insufficient and that more study, including soil boring tests, should have been made. As to additional soil boring tests, the evidence shows that it is not a common engineering practice to perform soil testing throughout the entire area that will be submerged. Therefore, the existing tests were adequate to support the engineering assumptions. Further, even if there were some infirmities in the data and assumptions used and made in the 1989 Dames and Moore report, as alleged by Petitioners, the errors or omissions were minor, they were subject to later refinement by professional engineers, and they did not materially affect the overall validity of the current application. Finally, the application file contains uncontradicted technical information supporting the issuance of the permit.

17. Petitioners' other concerns, while sincere and well-intended, are not relevant to the permitting process. For example, a concern that the construction of a berm will decrease nearby property values, even if true, is not a consideration in the permitting process. Similarly, Petitioners' valid concern that some nearby upland trees will be damaged if water levels rise for a prolonged period of time is not a basis under existing District rules to deny the permit. At the same time, whether the project is cost-effective and the best alternative for alleviating flooding conditions in the area are political decisions for the County, and thus they are not in issue in this proceeding.

18. Finally, Petitioners have pointed out that the County has not completed acquisition of the necessary easements for the project, and that until this is done, a permit should not issue. However, the District has specifically provided as a condition precedent to any construction work that the County finalize ownership or control for all property where water levels will be raised by the project.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

20. As the party seeking a permit, the County bears the burden of proving by a preponderance of the evidence that the

application should be granted. Dep't of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 789 (Fla. 1st DCA 1981).

21. In order to show entitlement to a permit, the County must give reasonable assurances that the permitting criteria in Rules 40D-4.301, 40D-4.302, and 40D-40.302, Florida Administrative Code, have been satisfied. By a preponderance of the evidence, this burden has been met.

22. The existence of possible alternative projects, the project's cost effectiveness, the possible adverse impacts to upland tree species, and the potential for a decrease in the value of adjacent property, while well-intended concerns on the part of Petitioners, are not criteria which may be considered by the District in the permitting process. See, e.g., Council of the Lower Keys v. Toppino, 429 So. 2d 67 (Fla. 3d DCA 1983). This being so, the application should be granted.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Southwest Florida Water Management District enter a final order granting Hernando County's application for Standard General Environmental Resource Permit No. 449342.01.

DONE AND ENTERED this 8th day of June, 1998, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 8th day of June, 1998.

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 within fifteen days. Any exceptions to this Recommended Order should be filed with the Southwest Florida Water Management District.