

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARLOS M. BERUFF, as Trustee)
under Florida Land Trust)
No. 22 dated March 30, 1989,)
)
Petitioner,)
)
vs.) Case No. 99-4158
)
SOUTHWEST FLORIDA WATER)
MANAGEMENT DISTRICT,)
)
Respondent.)

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CARLOS M. BERUFF, as Trustee)
under Florida Land Trust)
No. 22 dated March 30, 1989,)
)
Petitioner,)
)
vs.) Case No. 99-4159
)
SOUTHWEST FLORIDA WATER)
MANAGEMENT DISTRICT,)
)
Respondent.)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division
of Administrative Hearings, conducted the final hearing in
Tampa, Florida, on December 8-10, 1999.

APPEARANCES

For Petitioner: S. W. Moore
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Brigham, Moore, Gaylord, Schuster,
Merlin & Tobin, LLP
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For Respondent: Mark F. Lapp
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2379 Broad Street
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STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to an environmental resource permit for a surface water management system and the alteration of a wetland in connection with the construction of two warehouses, paved parking and loading areas, a detention pond, and enhancement of the remainder of the existing wetland. If not otherwise entitled to the permit, an additional issue is whether Petitioner is entitled to the permit through an exemption, waiver, or variance from the standard requirements for mitigation.

PRELIMINARY STATEMENT

On November 10, 1998, Petitioner filed a Petition for Exemption, Waiver or Variance as to Mitigation Requirements. Relying upon Section 120.542, Florida Statutes, and Rule 40D-1.52, Florida Administrative Code, the petition seeks an exemption, waiver, or variance from Chapter 373, Florida Statutes, and any environmental resource permitting rules that would require offsite wetlands mitigation and any additional

onsite wetlands mitigation, in addition to the 1.592 acres of wetlands already proposed for preservation and enhancement.

In support of the request for an exemption, waiver, or variance, the petition alleges that the subject property has been platted since 1911 and consists almost entirely--4.89 of 5.49 acres--of a wetland. The petition asserts that the wetland was historically herbaceous, but is now forested, isolated, and infested with Brazilian pepper trees. The petition states that the proposed activity would set aside 29 percent, or 1.592 acres, of the total site acreage, and the only uplands on the site consist of a developed access road totaling 0.6 acres. The petition claims that Petitioner cannot make any other economically viable use of the property without impacting the remaining onsite wetlands.

Noting that the wetland is small, isolated, and surrounded by industrial development, the petition reasons that the wetland does not serve as valuable habitat for native wildlife. The petition contends that the proposed surface water management system and development should adequately provide for any water storage and aquifer recharge presently occurring onsite. The petition warns that, absent the project, the wetland would continue to deteriorate through the invasion of nuisance exotic species.

The petition seeks relief in the form of an exemption, waiver, or variance, as appropriate.

On November 13, 1998, Petitioner filed an application for an environmental resource permit to construct two warehouses with parking and driveways on a 5.88-acre parcel, of which 4.95 acres are wetlands. The application proposed the destruction of 3.37 acres of wetlands and preservation and enhancement of 1.59 acres of existing wetlands.

On August 26, 1999, Respondent issued a Notice of Final Agency Action Denying Environmental Resource Permit Application No. 4318761.00 and an Order Denying the Petition for Exemption, Waiver or Variance as to Mitigation Requirements.

On September 9, 1999, Petitioner filed a Petition for Consolidated Hearing on Denial of Permit and Denial of Exemption, Waiver, or Variance as to Mitigation Requirements. This petition asserts that Respondent acted arbitrarily and capriciously, so as to deprive Petitioner of all reasonable use of his property, when Respondent denied Petitioner's requests for an environmental resource permit and an exemption, waiver, or variance.

In particular, the petition alleges that Respondent denied the permit due to Petitioner's failure to provide reasonable assurance concerning downstream drainage capacity

and water quality impacts to receiving waters and adjacent lands; onsite and offsite flooding; flooding of Bowlees Creek; additional runoff into the drainage facilities constructed in connection with the 301 Park of Commerce at 24th Street; and the loss of drainage due to a proposed berm. Other alleged shortcomings in reasonable assurance arise from Petitioner's alleged failure to provide mitigating storage to offset the filled wetland or demonstrate that no adverse impacts result from the loss of storage; calculations showing that 10.6 cubic feet per second discharge from the onsite wetland into the 42-inch storm sewer will not adversely impact the receiving drainage system of ditches and Bowlees Creek; documentation to confirm that the proposed berm east of 24th Street will not block drainage; evidence that Manatee County will accept the additional runoff from the wetland and into the 24th Street East storm sewer; documentation to support a Curve Number of 96 for the 7.2-acre area of the contributing watershed of the wetland in the predevelopment analysis of the proposed project; an assessment of the wetland's relative functions; consideration and implementation of practicable design modifications; a mitigation proposal offsetting the loss of wetland functions; consideration of secondary impacts to habitat functions; consideration of cumulative impacts and any necessary mitigation plan; an accurate and reproducible

depiction of Respondent's verified wetland delineation boundary; and demonstration that the proposed project is not contrary to the public interest.

The petition asserts that Petitioner has provided all of the information alleged by Respondent to be absent. The petition concludes that the denial of the permit was based on unsubstantiated environmental considerations, so as to be a gross abuse of discretion and an uncompensated taking.

As for the issues concerning the denial of the petition for an exemption, waiver, or variance as to the mitigation requirements, the petition alleges that Petitioner had the wetland surveyed and flagged; expended considerable time, effort, and money to address the wetland permitting requirements; identified the rule from which he seeks a variance or waiver; provided reasonable assurance that the construction of the proposed surface water management system would not adversely impact the value of functions provided to fish and wildlife and listed species; provided reasonable assurance that the construction of the proposed surface water management system would not cause adverse secondary impacts to water resources; showed that the improper construction of a recent drainage system has caused artificially high water levels so that the current condition and relative value of wetland functions are low; showed that the proposed project

and development would not cause unacceptable cumulative impacts; provided reasonable assurance that the construction of the proposed surface water management system would not be contrary to the public interest, after consideration of the relevant public-interest criteria; and showed generally that the proposed project and development satisfied all of the requirements of the Basis of Review.

Addressing mitigation, the petition rejects the possibility of a conveyance by Petitioner of a separate parcel as a form of mitigation due to reasons of economic viability and private property rights. The petition asserts that the wetland is surrounded by industrial development and, despite the value of other small, isolated wetlands, is not providing any valuable function. The petition contests Respondent's assertion that the wetland is used by birds, fish, mammals, and aquatic invertebrates, alleging instead that the wetland is subject to an infestation of Brazilian pepper. Lastly, the petition contends that Petitioner has shown that, absent a permit, exemption, variance, or waiver, he would suffer a substantial hardship or that the denial of any relief would violate principles of fairness.

In reliance upon numerous cited statutes and rules, as well as the constitutions of the United States and State of Florida, the petition seeks relief in the form of either an

environmental resource permit or an exemption, variance, or waiver.

By letter dated September 30, 1999, Respondent transmitted the consolidated petition to the Division of Administrative Hearings to conduct a formal hearing on the issues raised in the petition. The Division of Administrative Hearings assigned two case numbers to the consolidated petition. DOAH Case No. 99-4158 applies to the agency's tentative denial of the request for an environmental resource permit, and DOAH Case No. 99-4159 applies to the agency's denial of an exemption, variance, or waiver.

At the hearing, Petitioner called five witnesses and offered into evidence Petitioner Exhibits 1-22 and 24-25. Respondent called five witnesses and offered into evidence Respondent Exhibits 1-14. The parties filed Joint Exhibit 1. All exhibits were admitted except for Petitioner Exhibits 16a and 16b, which were proffered.

The court reporter filed the Transcript on January 6, 2000.

FINDINGS OF FACT

I. Background

1. Petitioner Carlos M. Beruff, as Trustee under Florida Land Trust No. 22 dated March 30, 1989 (Petitioner), purchased 85 acres of land in Manatee County for \$1.2 million in May

1989. (All acreages are approximate.) The east boundary of the 85-acre parcel consists of about 1700 feet of frontage along U.S. Route 301.

2. One month after the purchase, Petitioner sold 70 of the 85 acres for \$1.6 million. In the intervening month, Petitioner incurred no significant expenses for development or marketing, although the development and marketing expertise of Carlos Beruff facilitated the \$1.6 million sale.

3. The 70 acres that were sold included the frontage on U.S. Route 301. The 15 acres remaining after the sale comprise two tracts of 9 and 5.88 acres. In these cases, Petitioner seeks an environmental resource permit (ERP) for activities involving the 5.88-acre parcel (Site).

4. The 9-acre parcel occupies the northwest corner of the 85-acre parcel. The Site, which was platted in 1911, is the only noncontiguous land constituting the 85-acre parcel; it is 450 feet south of the remainder of the 85-acre parcel. The sole parcel between the Site and the remainder of the 85-acre parcel was originally owned by Lowe's and is now owned by Cheetah Technologies (Cheetah Parcel).

5. The 5.88-acre Site is subject to a road right-of-way of 0.32 acres in favor of the Cheetah Parcel. Of the remaining 5.56 acres, 4.66 acres are wetland and 0.9 acres are upland. The 0.9 acres of upland are subject to an access

easement of 0.42 acres, also in favor of the Cheetah Parcel, so the net available upland acreage is only 0.48 acres.

6. The Cheetah Parcel occupies the northwest corner of U.S. Route 301 and Saunders Road (also known as 63rd Avenue East). The Site is immediately west and south of the Cheetah Parcel and occupies the northeast corner of Saunders Road and 24th Street East (also known as Arlin Road). The Site is about 530 feet west of the intersection of U.S. Route 301 and Saunders Road.

7. U.S. Route 301 is a major arterial, and Saunders Road is at least a major collector road. The Site contains about 600 feet of frontage along Saunders Road and 465 feet of frontage along 24th Street East.

8. The Site is in unincorporated Manatee County roughly midway between downtown Bradenton and downtown Sarasota. Saunders Road crosses a north-south railroad line approximately one-half mile west of the Site and Bowlees Creek about 650 feet west of the railroad track.

9. The 9-acre parcel still owned by Petitioner is about 350 feet north-south by 1250 feet east-west. The western boundary of the 9-acre parcel runs along the east side of the railroad line. Like the other parcels involved in this case, the 9-acre parcel drains into Bowlees Creek.

10. The Site is in an area characterized by industrial land uses, including warehouses, a junkyard, an industrial center, and a bakery. A halfway house for persons recently released from prison is located one-quarter mile to the west of the Site. The Site is zoned HM (heavy manufacturing), which is a limited, and thus valuable, zoning category in Manatee County.

11. Respondent has issued three relatively recent surface water management permits that are relevant to these cases: a 1986 permit for the development of the Cheetah Parcel (Cheetah Permit), a 1988 permit for the widening of Saunders Road from two to four lanes (Saunders Road Permit), and a 1989 permit for the construction of a commercial park north of the Site known as 301 Park of Commerce (301 Permit).

12. Bowlees Creek runs from north to south, emptying into Sarasota Bay across from Longboat Key. Sarasota Bay is an Outstanding Florida Water. Bowlees Creek drains a nine square-mile basin, which is about 21-25 percent developed. The Bowlees Creek basin is an open drainage basin.

13. Due to flooding problems, Manatee County has imposed special limitations upon development within the Bowlees Creek basin. Among these limitations is that the rate of post-development runoff must be less than the rate of pre-development runoff--up to 50 percent less, according to expert

witnesses for both sides (Lawrence Weber, Tr. Vol. III, pp. 118-19; and Daryl Flatt, Tr. Vol. IV, p. 230).

14. By stipulation, the Site is at the extreme eastern end of the Bowlees Creek basin. In fact, the Site may have historically drained into Bowlees Creek and will drain into Bowlees Creek after, as described below, the northwest window is added to the surface water management system.

15. In 1993 or 1994, Petitioner began the process of developing the Site following the sale five years earlier of the larger 70-acre parcel. Mr. Beruff has been in the development business for 20 years. His career began in 1980 when Mr. Beruff became an employee for U.S. Homes and Modern Builders; he became self-employed in 1984. Mr. Beruff has developed seven commercial and ten residential developments.

II. Application Process

16. Deciding to pursue warehouse development for the Site, Petitioner initiated the development process by hiring an engineer and environmental consultant. With the assistance of these consultants, Petitioner prepared its application for an ERP.

17. By application dated October 9, 1998, and filed November 13, 1998, Petitioner requested that Respondent issue an individual ERP for the construction on the Site of a surface water management system in connection with the

construction of two warehouse buildings, paved parking and loading areas, and a detention pond, as well as the enhancement of the remainder of the existing wetland (Application). The Application states that the total building, parking, and loading areas would be 58,026 square feet and that wetlands constitute 3.37 acres of the 5.88-acre Site.

18. The site plan attached to the Application shows a "wetland preservation & enhancement" area of 1.592 acres at the north end of the Site. To the south, toward Saunders Road, are two buildings with paved parking and loading areas. On the southwest corner is a "stormwater treatment & attenuation" area.

19. After several discussions with Respondent's staff, Petitioner modified the proposed development. In its latest revision, the footprint of the proposed development would occupy 2.834 acres of wetland, leaving 1.826 acres of wetland.

20. On November 13, 1998, Petitioner filed a Petition for Exemption, Waiver or Variance as to Mitigation Requirements, seeking an exemption, waiver, or variance from all laws requiring offsite mitigation or additional onsite mitigation for the portion of the wetland that would be destroyed by the proposed development.

III. Drainage

21. At present, the Site receives runoff from a total of 27 acres. The offsite contributors of runoff are the Cheetah Parcel and a segment of Saunders Road east of 21st Street East. These locations have drained into the Site for hundreds of years.

22. In general, drainage raises two distinct issues: water quality and water quantity. For an open drainage basin, the issue of water quantity expresses itself primarily in runoff discharge rate, although historic basin storage is also an issue.

23. As discussed in the Conclusions of Law, the Respondent's Basis of Review identifies different storm events to which applicants must design different components of surface water management systems. For water quantity, the system may release no more than the permitted discharge rate in the design storm, which is the 25-year, 24-hour storm event. At present, the design storm would produce about eight inches of rain, although the same design storm, due to a different model or modeling assumptions, produced 9.5 inches of rain at the time of the issuance of the permit for the Cheetah Parcel. (The practical effect of this change in the calculation of the design storm is that the quantitative capacity of the surface water management system of the Cheetah

Parcel is nearly 20 percent greater than would be required today.)

24. For water quality, the system must capture the first inch of runoff (sometimes only the first half-inch of runoff, depending on the type of system and receiving waterbody). In contrast to the relatively infrequent 25-year storm, approximately 90 percent of the storms in Respondent's jurisdiction produce no more than one inch of runoff. The underlying premise is that the first inch of runoff contains nearly all of the contaminants that will be flushed from impervious surfaces.

25. The Cheetah surface water management system features a wetland and a retention pond along the north property line of the Site. The Cheetah pond and wetland attenuate runoff before allowing it to drain south onto the Site. The Cheetah surface water management system also includes a swale running north along 24th Street East to take runoff eventually to Bowlees Creek.

26. The Saunders Road surface water management system discharging onto the Site consists largely of an underground, offline storage and attenuation system that stores excess runoff, as compared to pre-development rates, in lateral pipes off a weir.

27. Nothing in the record suggests that the surface water management systems authorized by the Cheetah Permit or the Saunders Road Permit fail to provide reasonable assurance that the discharged runoff is of satisfactory water quality.

28. Following their respective permits in 1986 and 1988, respectively, the rates of discharge of runoff from the Cheetah Parcel and Saunders Road were no greater post-development than they had been pre-development. The Cheetah Parcel post-development and pre-development discharge rates were both 10.6 cubic feet per second (cfs). The Saunders Road post-development and pre-development discharge rates were both 32.4 cfs.

29. In issuing the 301 Permit, Respondent authorized the construction of a drainage system that would take runoff north along 24th Street East and then west, eventually emptying into Bowlees Creek. Conforming to the previous drainage system, the new system replaced an open ditch with underground stormwater pipes.

30. Of particular relevance to the Site, two prominent features of the system authorized by the 301 Permit were windows in the vicinity of the southwest and northwest corners of the Site (Southwest Window and Northwest Window).

31. A window is an opening in the wall of a hardened structure whose purpose includes drainage. The opening is

constructed at a certain elevation and a certain size to allow specified volumes or rates of water to pass into the structure and then offsite.

32. The 301 Permit authorized the construction of a swale along the southwest corner of the Site to direct runoff discharging from the Saunders Road system into the Southwest Window. This swale has been constructed.

33. However, several problems have precluded the construction of the Southwest Window, probably permanently. The most serious problem, from an engineering perspective, is the failure to lay the stormwater pipe along 24th Street East at the proper depth. The stormwater pipe was erroneously installed at an elevation of 15.32 feet National Geodetic Vertical Datum (NGVD), and the Southwest Window was to have been cut at a control elevation of 14.75 feet NGVD. The discharge elevation of the Saunders Road outlet precludes raising the control elevation of the Southwest Window sufficiently to allow gravity drainage into the stormwater pipe.

34. Exacerbating the discrepancy among the as-built elevations of the three structures is what appears to be a design problem belatedly recognized by Respondent. Respondent is justifiably concerned that the Southwest Window, at a control elevation of 14.75 feet NGVD, would draw down the

water elevation of the Site's wetland, which is at a wet season elevation of 16.5 feet NGVD (now actually 17 feet NGVD, possibly due to the absence of the Southwest Window).

35. A third problem with the Southwest Window is that the southwest corner of the Site was not historically a point of discharge, so the Southwest Window would deprive the Site's wetland of runoff.

36. Fortunately, neither the Southwest nor the Northwest Window is essential for the proper operation of the surface water management system of 301 Park of Commerce, which largely depends on a series of lakes for treatment and attenuation.

37. The Northwest Window was to be at elevation 16.5 feet NGVD, and its construction would provide needed drainage for the Site. In general, the Northwest Window does not raise the same concerns as does the Southwest Window. The Northwest Window is in the vicinity of the historic point of discharge for the Site and replaces a ditch permitted for the Cheetah Parcel to take runoff north along 24th Street East. The Northwest Window would also alleviate a standing-water problem at the northwest corner of the Site.

38. However, Manatee County, which controls the right-of-way on which the Northwest Window is located and is responsible for its construction and maintenance, has discovered that it lacks a sufficient property interest to

access the Northwest Window. The County has since initiated the process by which it can obtain the necessary interest, and, once completed, the County will cut the Northwest Window into the existing structure. Due to the role of the Northwest Window in draining the runoff in the area, including the Site, the Application reincorporates the Northwest Window, as it should have been constructed pursuant to the 301 Permit.

39. Although the Cheetah and Saunders Road permits resulted in greater runoff volume entering the Site, more importantly to area drainage, these permits did not result in greater runoff rates and or in a deterioration in runoff water quality. Likewise, the failure to construct the Southwest Window and Northwest Window is not especially relevant to area drainage, nor is the likely inability ever to construct the Southwest Window.

40. Far more important to area drainage is the fact that Petitioner proposes that the Site, post-development, would produce a runoff rate of 10.6 cfs, as compared to a pre-development runoff rate of 7 cfs. A serious adverse impact to area drainage, the proposed activity increases the runoff rate by 50 percent in a floodprone, 80-percent builtout basin--a basin of such sensitivity that Manatee County is imposing a post-development requirement of substantially reduced runoff rates.

41. The cumulative impacts of the proposed development, together with existing developments, would be to cause substantial flooding of the Bowlees Creek basin.

42. Petitioner's expert attempted to show that the runoff from the Site, which is at the extreme eastern end of the Bowlees Creek basin, would be delayed sufficiently so as not to exacerbate flooding. Respondent's expert thoroughly discredited this testimony due, among other things, to its reliance upon obsolete data and an unrealistic limitation upon the assumption of the direction of travel of storms.

43. Similarly, Petitioner failed to prove that the authorized discharge rate for the 301 Permit is 42 cfs. This assertion is most succinctly, though not exclusively, rebutted by the fact that the 42-inch pipe can only accommodate 18 cfs. Even if the 42-inch pipe could accommodate a substantially greater runoff rate, Petitioner's expert would have erroneously inferred a permitted discharge rate from this increased capacity without negating the possibility that other structures in the 301 surface water management system effectively reduced the rate or that oversized structures existed to accommodate higher runoff rates in storms greater than the design storm.

44. In addition to increasing the runoff rate by 50 percent, Petitioner's proposal would also reduce the historic

basin storage by over 40 percent. Displaced basin storage moves downstream, increasing flood levels from fixed storm events.

45. At present, the Site provides 8.68 acre-feet of historic basin storage. The Application proposes to replace this storage with storage in the wetland and retention pond totaling only 4.9 acre-feet. The loss of 3.8 acre-feet of basin storage means that this additional volume of water would, post-development, travel down Bowlees Creek.

46. A final drainage deficiency in Petitioner's proposal arises out of a berm's proposed outside of the Northwest Window. A one-foot bust in the survey of Petitioner's expert would have resulted in this berm preventing runoff from entering the Site from the Cheetah Parcel, as runoff presently does.

47. Respondent's expert suggested several possible alternatives that might result in a permittable project with respect to post-development runoff rates (the record is silent as to the effect of these alternatives upon historic basin storage, although it would seem that they would add storage). Reducing the area of destroyed wetlands to one acre would probably reduce the excess of post-development runoff rate to 1-2 cfs. Petitioner could then obtain offsetting attenuation through a variety of means, such as by obtaining an easement

to use the wetland on the Cheetah Parcel, constructing an attenuation pond on the 9-acre parcel, or constructing underground vaults in the filled area of the wetland on the Site.

IV. Wetlands

48. Except for the road right-of-way, the Site is undeveloped and forested. The presence of 25-year-old red maples militates against attributing the transition from an herbaceous to a forested wetland to the failure to install the Northwest and Southwest windows. More likely, this transition to the sub-climax species of red maple and willow (in the absence of a cypress source) is due to the repression of fire on the Site.

49. Experts for the opposing sides differed sharply in their biological assessments of the wetland. Petitioner's expert described a stressed wetland whose impenetrable thicket provided habitat only to a lone rat and swarm of mosquitoes. Respondent's expert described a robust wetland featuring a luxuriant overstory of red maple and Carolina willow; an rich understory of ferns, and diverse wildlife ranging from birds in the air (direct evidence); fish, snails, and tadpoles in a small pond (direct evidence); and squirrel and opossum (indirect evidence) scampering (indirect evidence) among the buttonbush, elderberry, and wax myrtle (direct evidence).

50. Undoubtedly, the wetland has been stressed; approximately 30 percent of the wetland vegetation is Brazilian pepper, which is a nuisance exotic. However, the wetland is well hydrated. Issuance of the Cheetah Permit was predicated, in part, upon the rehydration of the wetland on the Site. With the issuance of the Cheetah Permit and especially the Saunders Road Permit, the quality of water entering the wetland has improved by a considerable amount. As already noted, added volumes of runoff are entering the wetland since the issuance of these two permits, although post-development runoff rates are the same as pre-development runoff rates. On balance, the wetland is functioning well in providing habitat and natural drainage functions.

51. Giving due weight to the current condition of the wetland, the enhancement offered by Petitioner does not approach offsetting the loss of wetland area. In return for destroying 2.83 acres of the wetland, Petitioner proposed the enhancement of the remaining 1.83 acres by removing exotic species to no more than 10 percent of the total vegetation.

52. The mitigation is plainly insufficient because of the level of functioning of the entire wetland at present. Additionally, Petitioner has failed to demonstrate that the Brazilian pepper, which is the major nuisance exotic occupying the Site, is evenly distributed; to the contrary, it is

present mostly outside the wetland, along a berm just outside of the wetland. The lack of seedlings and old specimens suggests that the Brazilian pepper population may not be stable and may itself be stressed. Petitioner's failure to show that the remaining wetland area has more than 10 percent infestation or is likely to suffer additional infestation further undermines the effectiveness of the proposed mitigation.

53. Respondent has never issued an ERP for a proposed activity involving the alteration of wetlands when the enhancement mitigation ratio is as low as .65:1, as Petitioner proposes. In general, Respondent requires higher mitigation ratios when proposals involve wetlands enhancement, rather than wetlands creation, because the wetlands to be enhanced are already functioning--in these cases, at a relatively high level.

54. Although Petitioner has been unwilling to consider such alternatives, numerous alternatives exist for offsite mitigation or mitigation banking, if insufficient area exists for adequate onsite mitigation.

55. Lastly, Petitioner devoted considerable effort at hearing to portraying Respondent's handling of the Application as flawed and unfair. However, the evidence does not support these assertions.

56. Most strikingly, Respondent's staff treated the drainage windows inconsistently, to the benefit of Petitioner. They treated the Northwest Window as installed for the purpose of calculating the pre-development runoff discharge rate to Bowlees Creek. Until the Northwest Window is installed, the actual rate is even lower. This approach is justifiable because the Northwest Window will be installed at some point. On the other hand, Respondent's staff ignored the higher wetland elevation on the Site, presumably resulting from the absence of the Southwest Window. However, this approach, which benefits Petitioner in calculating wetland drawdown effects, is unjustifiable because the Southwest Window probably will never be installed.

57. Petitioner's specific complaints of unfair treatment are unfounded. For example, Petitioner suggested that Respondent credited Lowe's with wetland acreage for the littoral shelf of its wetland, but did not do so with the wetland on the Site. However, Petitioner produced no evidence of similar slopes between the two shelves, without which comparability of biological function is impossible. Additionally, Petitioner ignored the possibility that, in the intervening 14 years, Respondent may have refined its approach to wetland mitigation.

58. Although occurring at hearing, rather than in the application-review process, Respondent's willingness to enter into the stipulation that the Site presently drains into Bowlees Creek, despite recent data stating otherwise, was eminently fair to Petitioner. Absent this stipulation, Respondent would have been left with the formidable prospect of providing reasonable assurance concerning drainage into the floodprone Bowlees Creek when the post-development rate was 10.6 cfs and the pre-development rate was 0 cfs.

CONCLUSIONS OF LAW

59. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (Unless preceded by "Basis of Review," all references to Sections are to Florida Statutes. All references to Rules are to the Florida Administrative Code.)

60. Petitioner has the burden of showing its entitlement to the ERP. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

61. Citing Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1379 (Fla. 1981), Petitioner argues that the "initial burden of proof" is on Respondent. In Graham and similar cases, the courts examine carefully the statutory scheme enacted by the Legislature in order to determine the proper allocation of the burden of proof. However, some language in

these cases suggests an allocation of the burden of proof to the governmental agency when the denial of a permit would deprive an applicant of the use of its property.

62. In the present cases, the statutory scheme clearly places the burden of proof on Petitioner, and the denial of the ERP for the proposed development does not mean the deprivation of economic use of the Site. (It is thus unnecessary to consider the more difficult issue whether, with the sale of the 70 acres and the clear ability to sell or develop the nine acres, Petitioner has already enjoyed the full economic use of its property.)

63. Even if, as Petitioner contends, Respondent were required to make an initial showing of adverse impacts, Respondent has done so with respect to the post-development conditions of a 50 percent increase of runoff discharge rate, a 40+ percent loss of historic basin storage, and the uncompensated loss of functioning wetland.

64. Sections 373.413 and 373.414 require that an applicant show that its proposed activity will not be harmful to the water resources or inconsistent with the objectives of Respondent. A broad range of statutes and rules applies to the Application because Petitioner proposes activities in a wetland, as well as other activities outside of wetlands to

construct, operate, and maintain a surface water management system.

65. As for activities outside of wetlands, Sections 373.413(1) and 373.416(1) authorize the water management districts to adopt rules and impose permit conditions to ensure that the construction, alteration, operation, or maintenance of surface water management systems complies with applicable statutes and rules and does not harm the water resources. Section 373.413(2) requires that a person seeking to perform a regulated activity must obtain a permit before commencing work.

66. Rule 40D-40.301 provides:

(1) In order to obtain a standard general, individual, or conceptual permit under this chapter or Chapter 40D-40, F.A.C., an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a surface water management system:

(a) will not cause adverse water quantity impacts to receiving waters and adjacent lands;

(b) will not cause adverse flooding to on-site or off-site property;

(c) will not cause adverse impacts to existing surface water storage and conveyance capabilities;

(d) will not adversely impact the value of functions provided to fish and wildlife, and listed species including aquatic and wetland dependent species, by wetlands, other surface waters and other water related resources of the District;

(e) will not adversely affect the quality of receiving waters such that the

water quality standards set forth in chapters 62-3, 62-4, 62-302, 62-520, 62-522 and 62-550, F.A.C., including any antidegradation provisions of sections 62-4.242(1)(a) and (b), 62-4.242(2) and (3), and 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in sections 62-4.242(2) and (3), F.A.C., will be violated;

(f) will not cause adverse secondary impacts to the water resources;

(g) will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to Section 373.042, F.S.;

(h) will not cause adverse impacts to a work of the District established pursuant to Section 373.086, F.S.;

(i) is capable, based on generally accepted engineering and scientific principles, of being effectively performed and of functioning as proposed;

(j) will be conducted by an entity with financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued; and

(k) will comply with any applicable special basin or geographic area criteria established pursuant to this chapter.

* * *

(3) The standards and criteria contained in the Basis of Review for Environmental Resource Permit Applications shall determine whether the reasonable assurances required by subsection 40D-4.301(1) and Section 40D-4.302, F.A.C., have been provided.

* * *

67. Section 373.414(1)(a) provides that activities in wetlands must not be contrary to the public interest. Section 373.414(1) provides:

(1) As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the activity will adversely affect the fishing or

recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

68. Section 373.414(8) addresses cumulative impacts as follows:

The governing board or the department, in deciding whether to grant or deny a permit for an activity regulated under this part shall consider the cumulative impacts upon surface water and wetlands, as delineated in s. 373.421(1), within the same drainage basin as defined in s. 373.403(9), of:

(a) The activity for which the permit is sought.

(b) Projects which are existing or activities regulated under this part which are under construction or projects for which permits or determinations pursuant to s. 373.421 or s. 403.914 have been sought.

(c) Activities which are under review, approved, or vested pursuant to s. 380.06, or other activities regulated under this part which may reasonably be expected to be located within surface waters or wetlands, as delineated in s. 373.421(1), in the same drainage basin as defined in s. 373.403(9), based upon the comprehensive plans, adopted pursuant to chapter 163, of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations.

69. Section 373.414(9) authorizes Respondent to adopt rules:

The department and the governing boards, on or before July 1, 1994, shall adopt rules to incorporate the provisions of this section, relying primarily on the existing rules of the department and the water management districts, into the rules governing the management and storage of surface waters. Such rules shall seek to achieve a statewide, coordinated and consistent permitting approach to activities regulated under this part. Variations in permitting criteria in the rules of individual water management districts or the department shall only be provided to address differing physical or natural characteristics. Such rules adopted pursuant to this subsection shall include the special criteria adopted pursuant to s. 403.061(29) and may include the special criteria adopted pursuant to s. 403.061(34). Such rules shall include a provision requiring that a notice of intent to deny or a permit denial based upon this section shall contain an explanation of the reasons for such denial and an explanation, in general terms, of what changes, if any, are necessary to address such reasons for denial. Such rules may establish exemptions and general permits, if such exemptions and general permits do not allow significant adverse impacts to occur individually or cumulatively. . . .

70. Respondent's rules incorporate these requirements for an ERP in wetlands. Rule 40D-4.302(1) provides:

(1) In addition to the conditions set forth in Section 40D- 4.301, F.A.C., in order to obtain a standard general, individual, or conceptual permit under this chapter an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, and abandonment of a system:

(a) Located in, on, or over wetlands or other surface waters as delineated pursuant to the methodology authorized by subsection

373.421(1), F.S., will not be contrary to the public interest, or if such an activity significantly degrades or is within an Outstanding Florida Water, that the activity will be clearly in the public interest, as determined by balancing the following criteria:

1. whether the activity will adversely affect the public health, safety, or welfare or the property of others;

2. whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. whether the activity will be of a temporary or permanent nature;

6. whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of Section 267.061, F.S.; and

7. the current condition and relative value of functions being performed by areas affected by the proposed activity.

(b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters, as delineated pursuant to the methodology authorized by subsection 373.421(1), F.S.

* * *

71. Section 373.414(1)(b) adds that an applicant otherwise unable to meet the requirements of law for activities in wetlands may propose mitigation "to offset the adverse effects caused by the regulated activity." Mitigation may include "onsite mitigation, offsite mitigation, offsite

regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136."

72. Rule 40D-4.091(1) incorporates into the Florida Administrative Code Respondent's Basis of Review.

73. According to Basis of Review Section 1.1, Respondent adopted the Basis of Review to assist in the application of these statutes and rules to ensure that no permit will authorize activities harmful to the water resources or inconsistent with the public interest. Basis of Review Section 1.3 provides:

The primary goal of the review criteria is to meet District water resource objectives. However, the criteria are designed to be flexible. Performance criteria are used where possible. Other methods of meeting overall objectives will be considered depending on the magnitude of specific or cumulative impacts.

74. The Basis of Review also defines various terms used in the permitting process. The following definitions are relevant to these cases.

75. Basis of Review Section 1.7.17 defines "historic basin storage" as the "depression storage available on the site in the pre-development condition. The volume of storage is that which exists up to the required design storm."

76. Basis of Review Section 1.7.29 defines an "open drainage basin" as any watershed not meeting the definition of a "closed drainage basin." Basis of Review Section 1.7.1

defines a "closed drainage basin" as a basin lacking a surface outfall in flooding up to and including the 100-year flood.

77. Basis of Review Section 1.7.32 defines a "regulated activity" as the "construction, alteration, operation, maintenance, abandonment or removal of a system regulated pursuant to Part IV, Chapter 373, F.S."

78. Basis of Review Section 3.1.0 discusses the role of wetlands:

Wetlands are important components of the water resource because they often serve as spawning, nursery and feeding habitats for many species of fish and wildlife, and because they often provide important food storage, nutrient cycling, detrital production, recreational and water quality functions. . . . Not all wetlands or other surface waters provide all of these functions, nor do they provide them to the same extent. A wide array of biological, physical and chemical factors affect the functioning of any wetland or other surface water community. Maintenance of water quality standards in applicable wetlands and other surface waters is critical to their ability to provide many of these functions.

It is the intent of the Governing Board that the criteria in subsections 3.2 through 3.3.8 be implemented in a manner which achieves a programmatic goal and a project permitting goal of no net loss of wetlands or other surface water functions. This goal shall not include projects that are exempt by statute or rule or which are authorized by a noticed general permit. Unless exempted by statute or rule, permits are required for the construction, alteration, operation, maintenance, abandonment and removal of systems so that

the District can conserve the beneficial functions of these communities. The term "systems" includes areas of dredging and filling, as those terms are defined in s. 373.403(13) and (14), F.S.

79. Basis of Review Section 3.1.1 identifies the various provisions of the Basis of Review that apply to proposed activities, depending on whether they are in wetlands. Basis of Review Section 3.1.1(a) requires an applicant to provide reasonable assurance that any "regulated activity" will not "adversely impact the value of functions provided to fish, wildlife and listed species . . . by wetlands and other surface waters and other water related resources of the District." This section references Rule 40D-4.301(1)(d) and Basis of Review Section 3.2.2.

80. Basis of Review Section 3.1.1(b) requires an applicant to provide reasonable assurance that a "regulated activity located in . . . wetlands" will "not be contrary to the public interest" or, if such an activity "significantly degrades or is located within an Outstanding Florida Water," that the activity is "clearly in the public interest." This section references Basis of Review Section 3.2.3.

81. Basis of Review Section 3.1.1(f) requires an applicant to provide reasonable assurance that any "regulated activity" will "not cause adverse secondary impacts" to the water resources. This section excludes from consideration as

secondary impacts "[d]e minimis or remotely related secondary impacts." This section references Rule 40D-4.301(1)(f) and Basis of Review Section 3.2.7.

82. Basis of Review Section 3.1.1(g) requires an applicant to provide reasonable assurance that any "regulated activity" will "not cause adverse cumulative impacts upon wetlands and other surface waters." This section references Rule 40D-4.302(1)(b) and Basis of Review Section 3.2.8.

83. Basis of Review Section 3.2.1 predicates the permitting decision upon the "degree of impact to wetland . . . functions," the ability to mitigate this impact, and the "practicability of design modifications for the site."

84. Basis of Review Section 3.2.1.1 provides that, subject to two exceptions, Respondent shall consider whether an applicant has "implemented practicable design modifications" to "reduce or eliminate" adverse impacts. The exceptions are if the ecological value of the impacted wetland is low or the ecological value of the mitigation is high.

85. Basis of Review Section 3.2.1 adds: "Any adverse impacts remaining after practicable design modifications have been implemented may be offset by mitigation," which is addressed by Basis of Review Sections 3.3 through 3.3.8.

However, Basis of Review Section 3.2.1 warns: "To receive

District approval, a system cannot cause a net adverse impact on wetland functions and other surface water functions which is not offset by mitigation."

86. Basis of Review Section 3.3.1 notes that mitigation usually involves the "restoration, enhancement, creation, or preservation" of wetlands, other surface waters, or uplands.

87. Of particular relevance to these cases are the "mitigation ratio guidelines" at Basis of Review Sections 3.3.2 et seq. The discussion of mitigation ratios acknowledges that the exact ratio to be required is a function of several factors, as set forth in Basis of Review Sections 3.3.2.1 and 3.3.2.2. However, the mitigation ratio for enhancement, as opposed to creation and restoration, is higher because "the area being enhanced currently provides a degree of the desired functions, and this type of mitigation serves to increase, rather than create, those functions."

88. Basis of Review Section 3.3.2.1.2 states that the mitigation ratio guidelines for enhancement range from four acres of enhancement for each acre impacted to 20 acres of enhancement for each acre impacted. The enhancement ratios are relatively demanding ratios as compared to the ratios required for creation and restoration, as described by Basis of Review Section 3.3.2.1.1, of 1.5 acres to five acres for each acre of wetland impacted. However, the enhancement

ratios are relatively relaxed as compared to the ratios required for preservation, as described in Basis of Review Section 3.3.2.2, of ten to 60 acres for each acre of wetland impacted.

89. Basis of Review Section 3.2.2 provides that an applicant must provide reasonable assurance that a regulated activity will not impact the values of wetlands, other surface waters, and other water-related resources so as to cause adverse impacts to "the abundance and diversity of fish, wildlife and listed species" and "the habitat of fish, wildlife and listed species." In making these determinations, "the magnitude of the effect of the regulated activity shall be considered, and de minimis effects shall not be considered adverse." Basis of Review Section 3.2.2.3 requires consideration of the wetland's condition, hydrologic connection, uniqueness, location, and extent of fish and wildlife use.

90. Basis of Review Section 3.2.3 requires the District to "consider and balance" the seven statutory criteria, noted above, in determining whether a regulated activity in wetlands is not contrary to the public interest or, if "significantly" degrading or within an Outstanding Florida Water, is clearly in the public interest.

91. Basis of Review Section 3.2.3.1(c) requires the District, in considering the first of the seven criteria-- public health, safety or welfare of the property of others, to determine whether the regulated activity in wetlands will "cause flooding or alleviate existing flooding on the property of others." This section notes that an applicant gains at least a neutral consideration on this criterion if the application meets the water quantity criteria of Basis of Review Chapter 4.

92. Basis of Review Section 3.2.7(a) requires consideration of secondary impacts upon wetland functions from the intended or reasonably expected use of a proposed system.

93. Basis of Review Section 3.2.8 requires an applicant to provide reasonable assurance that a regulated activity will "not cause unacceptable cumulative impacts upon wetlands and other surface waters within the same drainage basin as the regulated activity for which a permit is sought."

94. A close reading of Basis of Review Section 3.2.8 reveals that cumulative impacts require consideration of two types of impacts not caused by the proposed activity: those impacts already existing at the time of the regulated activity that is the subject of the permit and those impacts likely to come into existence following the regulated activity that is the subject of the permit. Specifically, Basis of Review

Section 3.2.8.1 requires consideration of the proposed system, together with "past, present, and future activities as described in Section 3.2.8," for determinations of whether the proposed activity would cause violations of state water quality standards or "significant adverse impacts" to wetland functions, as identified in Section 3.2.2, "within the same drainage basin when considering the basin as a whole."

95. Basis of Review Section 4.2 limits "off-site discharge . . . to amounts which will not cause adverse off-site impacts." Basis of Review Section 4.2.a provides that the allowable discharge in an open drainage basin is:

1. historic discharge, which is the peak rate at which runoff leaves a parcel of land by gravity under existing site conditions, or the legally allowable discharge at the time of permit application, or
2. amounts determined in previous District permit actions.

96. Basis of Review Section 4.7 states: "Provision must be made to replace or otherwise mitigate the loss of historic basin storage provided by the project site."

97. Petitioner has failed to provide reasonable assurance in three respects.

98. First, Petitioner has failed to provide reasonable assurance that the proposed activity will not cause flooding in the already-floodprone Bowlees Creek basin because the

post-development runoff rate would exceed the pre-development runoff rate by 50 percent.

99. Petitioner failed to show that the post-development runoff rate was an amount determined by Respondent in any previous permit actions. The relevant runoff rate pertains to the Site, not another parcel, such as Saunders Road. Even if the Saunders Road runoff rate were relevant, the evidence does not establish that Respondent permitted a runoff rate sufficiently high for Saunders Road as to accommodate the 10.6 cfs runoff rate sought by Petitioner. The overriding objective of the Basis of Review, rules, and statutes is to protect the water resources of the State, including the limitation of flooding, and Petitioner's reading of the guidelines of Basis of Review Section 4.2.a.2 does not achieve this objective.

100. Considered in conjunction with the development already in place, the ERP sought in this case would exacerbate flooding in the Bowlees Creek basin. The absence in the record of any indication of already-permitted future development of the remaining 21-25 percent undeveloped area precludes consideration of cumulative impacts in terms of future development.

101. Additionally, the proposed berm outside the Northwest Window would also cause flooding at the southwest corner of the Cheetah Parcel.

102. Second, Petitioner has failed to provide reasonable assurance that the proposed activity will not reduce historic basin storage. To the contrary, the proposed activity will reduce historic basin storage on the Site by over 40 percent. Again, this downstream transfer of historic basin storage will exacerbate flooding in the Bowlees Creek basin.

103. Third, Petitioner has failed to provide reasonable assurance that the proposed activity will not destroy a portion of the existing wetland. To the contrary, the proposed activity, which is obviously permanent in nature, will destroy a portion of the existing wetland, which is a functioning wetland providing wildlife habitat and natural drainage. On balance, the proposed activity is contrary to the public interest.

104. Additionally, Petitioner has failed to show that it has minimized the proposed activity to the extent practicable. Petitioner has not attempted all reasonable design modifications to reduce or eliminate adverse impacts.

105. Petitioner has also failed to show the adequacy of its mitigation proposal, which is to enhance the remainder of the existing wetland left after filling the rest. The

proposed enhancement of 1.826 acres of wetland would compensate for the destruction of 2.834 acres of wetland in a ratio of about .6 acres of enhancement for each acre destroyed. This is dramatically less than the guideline ratios for enhancement mitigation.

106. In the alternative, Petitioner requests an ERP through an exemption, variance, or waiver.

107. Section 373.414(17) provides:

The variance provisions of s. 403.201 are applicable to the provisions of this section or any rule adopted pursuant hereto. The governing boards and the department are authorized to review and take final agency action on petitions requesting such variances for those activities they regulate under this part.

108. Section 403.201 states:

(1) Upon application, the department in its discretion may grant a variance from the provisions of this act or the rules and regulations adopted pursuant hereto. Variances and renewals thereof may be granted for any one of the following reasons:

(a) There is no practicable means known or available for the adequate control of the pollution involved.

(b) Compliance with the particular requirement or requirements from which a variance is sought will necessitate the taking of measures which, because of their extent or cost, must be spread over a considerable period of time. A variance granted for this reason shall prescribe a timetable for the taking of the measures required.

(c) To relieve or prevent hardship of a kind other than those provided for in

paragraphs (a) and (b). Variances and renewals thereof granted under authority of this paragraph shall each be limited to a period of 24 months, except that variances granted pursuant to part II may extend for the life of the permit or certification.

(2) No variance shall be granted from any provision or requirement concerning discharges of waste into waters of the state or hazardous waste management which would result in the provision or requirement being less stringent than a comparable federal provision or requirement, except as provided in s. 403.7221.

(3) The department shall publish notice, or shall require a petitioner for a variance to publish notice, in the Florida Administrative Weekly and in a newspaper of general circulation in the area affected, of proposed agency action; and the department shall afford interested persons an opportunity for a hearing on each application for a variance. If no request for hearing is filed with the department within 14 days of published notice, the department may proceed to final agency action without a hearing.(4) The department may require by rule a processing fee for and may prescribe such time limits and other conditions to the granting of a variance as it deems appropriate.

109. Section 373.406(6) provides:

Any district or the department may exempt from regulation under this part those activities that the district or department determines will have only minimal or insignificant individual or cumulative adverse impacts on the water resources of the district. The district and the department are authorized to determine, on a case-by-case basis, whether a specific activity comes within this exemption.

Requests to qualify for this exemption shall be submitted in writing to the district or department, and such activities shall not be commenced without a written determination from the district or department confirming that the activity qualifies for the exemption.

110. Section 120.542 states:

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. A public employee is not a person subject to regulation under this section for the purpose of petitioning for a variance or waiver to a rule that affects that public employee in his or her capacity as a public employee. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. An agency may limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant only to the extent necessary for the purpose of the underlying statute to be achieved. This section does not authorize agencies to grant variances or waivers to statutes or to rules required by the Federal Government for the agency's implementation or retention of any federally approved or delegated program, except as allowed by the program or when the variance or waiver is also approved by the appropriate agency of the Federal Government. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the

underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

(3) The Governor and Cabinet, sitting as the Administration Commission, shall adopt uniform rules of procedure pursuant to the requirements of s. 120.54(5) establishing procedures for granting or denying petitions for variances and waivers. The uniform rules shall include procedures for the granting, denying, or revoking of emergency and temporary variances and waivers. Such provisions may provide for expedited timeframes, waiver of or limited public notice, and limitations on comments on the petition in the case of such temporary or emergency variances and waivers.

(4) Agencies shall advise persons of the remedies available through this section and shall provide copies of this section, the uniform rules on variances and waivers, and, if requested, the underlying statute, to persons who inquire about the possibility of relief from rule requirements.

(5) A person who is subject to regulation by an agency rule may file a petition with that agency, with a copy to the committee, requesting a variance or waiver from the agency's rule. In addition to any

requirements mandated by the uniform rules, each petition shall specify:

(a) The rule from which a variance or waiver is requested.

(b) The type of action requested.

(c) The specific facts that would justify a waiver or variance for the petitioner.

(d) The reason why the variance or the waiver requested would serve the purposes of the underlying statute.

(6) Within 15 days after receipt of a petition for variance or waiver, an agency shall provide notice of the petition to the Department of State, which shall publish notice of the petition in the first available issue of the Florida Administrative Weekly. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which variance or waiver is sought, and an explanation of how a copy of the petition can be obtained. The uniform rules shall provide a means for interested persons to provide comments on the petition.

(7) Except for requests for emergency variances or waivers, within 30 days after receipt of a petition for a variance or waiver, an agency shall review the petition and request submittal of all additional information that the agency is permitted by this section to require. Within 30 days after receipt of such additional information, the agency shall review it and may request only that information needed to clarify the additional information or to answer new questions raised by or directly related to the additional information. If the petitioner asserts that any request for additional information is not authorized by law or by rule of the affected agency, the agency shall proceed, at the petitioner's written request, to process the petition.

(8) An agency shall grant or deny a petition for variance or waiver within 90 days after receipt of the original petition, the last item of timely requested additional material, or the petitioner's written request to finish processing the petition. A petition not granted or denied within 90 days after receipt of a completed petition is deemed approved. A copy of the order granting or denying the petition shall be filed with the committee and shall contain a statement of the relevant facts and reasons supporting the agency's action. The agency shall provide notice of the disposition of the petition to the Department of State, which shall publish the notice in the next available issue of the Florida Administrative Weekly. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which the waiver or variance is sought, a reference to the place and date of publication of the notice of the petition, the date of the order denying or approving the variance or waiver, the general basis for the agency decision, and an explanation of how a copy of the order can be obtained. The agency's decision to grant or deny the petition shall be supported by competent substantial evidence and is subject to ss. 120.569 and 120.57. Any proceeding pursuant to ss. 120.569 and 120.57 in regard to a variance or waiver shall be limited to the agency action on the request for the variance or waiver, except that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by this chapter.

(9) Each agency shall maintain a record of the type and disposition of each petition, including temporary or emergency variances and waivers, filed pursuant to this section. On October 1 of each year, each agency shall file a report with the Governor, the President of the Senate, and

the Speaker of the House of Representatives listing the number of petitions filed requesting variances to each agency rule, the number of petitions filed requesting waivers to each agency rule, and the disposition of all petitions. Temporary or emergency variances and waivers, and the reasons for granting or denying temporary or emergency variances and waivers, shall be identified separately from other waivers and variances.

111. The record does not support the granting of an ERP on the basis of an exemption, variance, or waiver. Although the Site is less than six acres, design and mitigation alternatives exist, but Petitioner has declined to explore them, evidently on economic grounds.

112. The drainage issues in this case graphically frame the fairness issue inherent in all requests for a special exemption, variance, or waiver. Downstream property owners have a right to expect that their government will enforce long-established statutes and rules for the protection of their lives and property from flooding. It would be an odd perversion of the notion of fairness to override the legitimate and time-honored expectations of landowners in order to allow Petitioner to develop the final 5.88 acres of its 85-acre parcel. It is thus unnecessary to apply the statutory provisions governing exemptions, variances, and waivers with respect to the portion of the denial of the ERP based on the wetlands issues.

RECOMMENDATION

Based on the foregoing, it is

RECOMMENDED that Respondent deny Petitioner's application for an environmental resource permit and for an exemption, variance, or waiver.

DONE AND ENTERED this 29th day of February, 2000, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.