

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WAYNE DUKE, SR., AND PHYLLIS)
DUKE,)
)
 Petitioners,)
)
vs.) Case No. 01-0014
)
SUWANNEE RIVER WATER MANAGEMENT)
DISTRICT,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Don W. Davis, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in this case on August 1, 2001, in Live Oak, Florida. The following appearances were entered:

APPEARANCES

For Petitioner: John L. Scott, Esquire
Post Office Box 475
Branford, Florida 32008

For Respondent: Bruce W. Robinson, Esquire
Kris B. Robinson, Esquire
Brannon, Brown, Haley,
Robinson & Bullock, P.A.
Post Office Box 1029
Lake City, Florida 32056-1029

STATEMENT OF THE ISSUE

The issue is whether Petitioners are entitled to an after-the-fact permit from Respondent for the garage and storage

building erected by Petitioners within the floodway of the Suwannee River.

PRELIMINARY STATEMENT

On April 2, 1999, Petitioners filed an application for a boat ramp with Respondent, Suwannee River Water Management District (District). That permit was ultimately granted. In April of 1999, personnel employed by Respondent went to the site and observed there was no garage and storage structure built on the lot. A copy of Respondent's rules was provided to Petitioners.

In 1999, Petitioners started and completed a garage and storage structure on their lot on the Suwannee River. They received a Notice of Violation dated April 18, 2000.

On June 19, 2000, Petitioners prepared a Notice of Intent to construct a surface water management system, which was received by Respondent on July 3, 2000. Respondent did not send a denial in response to this Notice, electing instead to institute a timely action in the circuit court pursuant to authority contained in Chapter 373, Florida Statutes.

At the final hearing, Petitioner, Wayne Duke, Sr., testified on his own behalf and presented the testimony of two witnesses. Petitioner also offered ten exhibits which were accepted into evidence. Respondent presented the testimony of three witnesses and 11 exhibits. No transcript of the final

hearing was ordered. Both parties have submitted Proposed Recommended Orders. Those Proposed Recommended Orders have been reviewed and utilized in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioners are the owners of real property located at Lot 15, Suwannee Bluffs as per Plat Book 4, page 18 of the public records of Lafayette County, Florida.

2. Respondent, Suwannee River Water Management District, is an agency of the State of Florida with a responsibility for surface water management within the District.

3. Petitioners live in a home on their Suwannee River property and, in 1999, completed a garage and storage structure on the property without obtaining a permit for construction of the structure. The structure measures 35 feet by 50 feet. It is a concrete block structure on a concrete slab with a metal roof. There are three doors on one side of the structure. The remainder of the structure is enclosed.

4. On or about March 31, 1999, Petitioners, prior to construction of the garage and storage structure, applied for an environmental resource permit for a boat ramp, which permit was subsequently granted.

5. The entire lot of Petitioners is within the floodway of the Suwannee River. The floodway is defined as a work of

Respondent's district in Rule 40B-4.3000, Florida Administrative Code.

6. The Suwannee River flows within the boundaries of the Suwannee River Management District.

7. On or about April 18, 2000, Notice of Violation was sent to Petitioners by Respondent.

8. On or about June 19, 2000, Petitioners executed a Notice of Intention to construct a surface water management system for the already completed garage structure. Basically, the surface water management system envisioned by Petitioners would have consisted of modifications to the already completed garage to permit flood waters to flow through the structure. Respondent did not send any responsive formal notice of denial to Petitioners regarding such proposed intention. Instead, Respondent filed a lawsuit in July of 2000, within the 90-day period required by Section 120.60(1), Florida Statutes, in circuit court against Petitioners to prevent the construction of the system. Such action by Respondent constituted denial of Petitioners' requested action.

9. Petitioners' garage construction was in violation of Ordinance 1-87 of Lafayette County, Florida, and in fact, Petitioners received a Notice of Violation from Lafayette County, Florida, dated December 9, 1999, which has still not been resolved.

10. Rule 40B-4.3040, Florida Administrative Code, prohibits the placing of a structure in the works of a District without a works of the District development permit. Petitioners' garage structure was not permitted and was in violation of the rules of the District in force and effect at the time of its construction, notwithstanding Respondent's informal delegation of enforcement of those rules to local county governments in Respondent's district prior to July 1999.

11. Rule 40B-4.3030 Florida Administrative Code, proscribes the issuance of a works of the District's development permit for any work structures, road, or other facilities which have the potential of individually or cumulatively reducing floodway conveyance or increasing water surface elevations above the 100-year flood elevation or increasing soil erosion. Testimony of two experts offered by Respondent at the final hearing establishes that the structure in question will cumulatively reduce floodway conveyance and increase water surface elevations above the 100 year flood elevations and potentially increase soil erosion. Adverse impacts to the public interest include the following:

- (a) increased flood levels;
- (b) increased scouring by debris and erosion; and
- (c) increased water surface elevations above the 100 year flood elevation.

12. The cumulative impact of allowing Petitioners' structure and other structures would magnify the problems of increased erosion, debris damage, and floodway conveyance. The cumulative impact from such construction along the water could have significant cumulative adverse impact on the waters of the State of Florida and specifically, the Suwannee River.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1) and Section 120.569, Florida Statutes.

14. The burden of proof, absent a statutory directive to the contrary, is on the party seeking the affirmative of the issue of the proceeding. Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

15. In this proceeding, Petitioners have the ultimate burden of proof and have failed to meet this burden. Petitioners' contend that the failure of Respondent to issue a specific denial to them with regard to their application to construct a surface water management system consisting of modifications to the unpermitted garage structure resulted in granting of permission to Petitioners by default pursuant to Section 120.60, Florida Statutes. Such contention is not persuasive. Respondent's disapproval was adequately

communicated to Petitioners via the circuit court action instituted to prevent Petitioners' project.

16. Petitioners failed to establish they were not in violation at the time of application for an Environmental Resource Permit (ERP) and that they did apply for an ERP. Further, Respondent's permitting process requires Petitioners to prove that the subject structure would not have the potential of individually or cumulatively reducing floodway conveyance or increasing water surface elevation above the 100-year flood elevation or increasing soil erosion. This Petitioners failed to do.

17. The property of Petitioners is within the floodway of the Suwannee River and, therefore, a work of the District. A works of the development district permit would be required for construction of the building at hand which has never been issued. The structure is in violation of Rule 40B-4.3040, Florida Administrative Code.

RECOMMENDATION

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

RECOMMENDED that the Suwannee River Water Management District enter a Final Order dismissing the petition in this case and denying the issuance of an after-the-fact works of the District permit to Petitioners.

DONE AND ENTERED this 20th day of August, 2001, in
Tallahassee, Leon County, Florida.

DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of August, 2001.

COPIES FURNISHED:

Bruce W. Robinson, Esquire
Kris B. Robinson, Esquire
Brannon, Brown, Haley,
Robinson & Bullock, P.A.
Post Office Box 1029
Lake City, Florida 32056-1029

John L. Scott, Esquire
Post Office Box 475
Branford, Florida 32008

Jerry Scarborough, Executive Director
Suwannee River Water Management District
9225 County Road 49
Live Oak, Florida 32060

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 should be filed with the agency that will issue the final order in this case.