

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BECKY AYECH,)
)
 Petitioner,)
)
 vs.) Case Nos. 01-2294
)
 SOUTHWEST FLORIDA WATER)
 MANAGEMENT DISTRICT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on September 25, 2001, in Sarasota, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Becky Ayech, pro se
421 Verna Road
Sarasota, Florida 34240

For Respondent: Jack R. Pepper, Esquire
Southwest Florida Water
Management District
2379 Broad Street
Brooksville, Florida 34604

STATEMENT OF THE ISSUE

The issue presented for decision in this case is whether Respondent, the Southwest Florida Water Management District (the "District"), should issue Water Use Permit ("WUP") No. 20005687.003 to Dr. Thomas E. Kelly, pursuant to the terms

of the proposed permit issued on April 11, 2001.

PRELIMINARY STATEMENT

On April 11, 2001, the District issued notice of final agency action for approval of general WUP No. 20005687.003 to the applicant, Dr. Thomas E. Kelly. The permit would authorize the use of 1,700 gallons of water per day ("gpd"), on an average annual basis, for irrigation and restroom use at Pop's Golf and Batting Center in unincorporated Sarasota County.

On May 1, 2001, Petitioner filed with the District a petition for formal hearing, challenging the proposed issuance of WUP No. 20005687.003 to Dr. Thomas E. Kelly, as more fully described below. On June 7, 2001, the District referred the petition to the Division of Administrative Hearings for assignment of an administrative law judge and conduct of a formal administrative hearing pursuant to Section 120.57(1), Florida Statutes.

At the formal hearing, the District presented the testimony of Ralph Perna, the owner of Pop's Golf and Batting Center, and of David Brown, a senior professional geologist with the District and expert in geology, hydrogeology, well and other withdrawal facility construction, and water use permitting. The District's Exhibits 1 through 8 were admitted into evidence.

Petitioner testified on her own behalf and presented the testimony of Ellen Richardson, a Sarasota resident. At the hearing, Petitioner's Exhibits 1 through 14, C through H, N, R through T and V were admitted. Petitioner's Exhibits J through L, M, O, P, and Q were rejected. Ruling was reserved on Petitioner's Exhibits 15 through 50 and B. By order issued on October 17, 2001, Petitioner's Exhibits 15 through 50 and B were admitted into evidence.

A Transcript of the final hearing was filed with the Division of Administrative Hearings on October 18, 2001. By order issued October 26, 2001, the District's motion for extension was granted, and the parties were ordered to file their proposed recommended orders no later than November 5, 2001. Both parties filed Proposed Recommended Orders on November 5, 2001.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following findings of fact are made:

I. PARTIES

1. Petitioner Becky Ayech is a resident of Sarasota County and a citizen of the State of Florida.

2. The District is a water management district in the State of Florida created pursuant to Section 373.069(1)(d) and

(2)(d), Florida Statutes. The District is the governmental agency charged with the responsibility and authority to review and act upon water use permit applications, pursuant to Chapter 373, Part II, Florida Statutes, and Chapters 40D-1 and 40D-2, Florida Administrative Code.

3. Dr. Thomas E. Kelly is the owner of the real property in Sarasota County on which Pop's Golf and Batting Center is located, and as such is recognized as the applicant for and holder of any WUP issued for the property. Pursuant to a 50-year lease with Dr. Kelly, Ralph Perna owns and operates Pop's Golf and Batting Center and is the person who would be responsible for day-to-day compliance with the terms of the WUP at issue. Neither Dr. Kelly nor Mr. Perna formally intervened in this proceeding.

II. THE PROPOSED PERMIT

4. The proposed permit is for irrigation and sanitary uses at a golf driving range and batting cage facility called Pop's Golf and Batting Center, on Fruitville Road in Sarasota County. The site leased by Mr. Perna comprises approximately 30 acres, of which the westward 15 acres is taken up by the Pop's facility. The eastern 15 acres is heavily wooded, overgrown with brush, and contains a five-acre lake.

5. The majority of the 15 acres used by Pop's is taken up by the landing area for the driving range. Near the front

of the facility are a tee box and putting green sown with Bermuda grass. This grassy area, about six-tenths of an acre, is the only part of the 30-acre property requiring irrigation, aside from some landscape plants in front of the business office. The landing area is not watered and is not even set up for irrigation.

6. The Pop's facility is in a low-lying area historically prone to flooding. For this reason, the tee box, putting green, and business office are elevated about two and one-half feet higher than the landing area. This elevation also serves the esthetic purpose of allowing golfers to follow the flight of their drives and watch the balls land.

7. The proposed WUP is a renewal of an existing permit. The existing permit is premised on the property's prior use for agriculture, and permits withdrawals of 34,000 gpd on an average annual basis and 99,000 gpd on a peak monthly basis. The renewal would authorize withdrawals of 1,700 gpd on an average annual basis and 4,400 gpd on a peak monthly basis, reductions of 95 percent and 96 percent, respectively.

8. "Average annual" quantity is the total amount of water withdrawn over the course of one year. This quantity is divided by 365 to arrive at the allowable gallons per day. "Peak monthly" quantity is the amount of water allowed to be

withdrawn during the driest month of the year. This quantity is divided by 30 to arrive at the allowable gallons per day.

9. Pop's draws water from two wells on the property. A six-inch diameter well, designated District Identification No. 1 ("DID 1"), is used for irrigation of the tee box and putting green. A four-inch diameter well, designated District Identification No. 3 ("DID 3"), is used to supply water to the two restrooms at the facility.

III. THE PERMIT CONDITIONS

10. The proposed WUP includes the following basic information: the permittee's name and address; the permit number; the date the permit application was filed; the date the permit was issued; the expiration date of the proposed permit; the property location; the quantity of water to be permitted; the withdrawal locations; and the water use classification proposed pursuant to the District's permit application.

11. The District's permit application provides the applicant with the following five choices regarding proposed water use: Public Supply; Industrial or Commercial; Recreation or Aesthetic; Mining or Dewatering; and Agriculture. The proposed permit in this case has been classified as Recreation or Aesthetic.

12. The proposed WUP would allow the permittee to withdraw from DID 1 an average of 1,600 gpd, with a peak monthly withdrawal of 4,200 gpd, and to withdraw from DID 3 an average of 100 gpd, with a peak monthly withdrawal of 200 gpd.

13. The proposed WUP contains four Special Conditions. Relevant to the issues raised in this proceeding, Special Condition No. 3 requires the permittee to incorporate best water management practices, to limit daytime irrigation to the greatest extent practicable, to implement a leak detection and repair program, to conduct a system-wide inspection of the irrigation system at least once per year, and to evaluate the feasibility of improving the efficiency of the current irrigation system.

14. Special Condition No. 4 requires the permittee to submit a conservation plan no later than April 30, 2006. The plan must address potential on-site reuse of water and external sources of reuse water.

15. The proposed WUP also contains 16 Standard Conditions. Standard Condition No. 2 reserves the District's right to modify or revoke the WUP following notice and a hearing, should the District determine that the permittee's use of the water is no longer reasonable and beneficial, consistent with the public interest, or if the water use interferes with an existing legal use of water.

16. Standard Condition No. 3 provides that the permittee may not deviate from the terms of the WUP without the District's written approval.

17. Standard Condition No. 4 provides that, if the District declares a water shortage pursuant to Chapter 40D-21, Florida Administrative Code, the District may alter, modify, or declare inactive all or any part of the proposed WUP as necessary to address the water shortage.

18. Standard Condition No. 5 provides that the District will collect water samples from DIDs 1 and 3, or require the permittee to submit water samples to the District, if the District determines there is a potential for adverse impacts to water quality.

19. Standard Condition No. 9 provides that the District may require the permittee to cease or reduce its withdrawals if water levels in aquifers fall below minimum levels established by the District.

20. Standard Condition No. 11 provides that the District may establish special regulations for Water Use Caution Areas ("WUCAs"), and that the permit will be subject to such regulations upon notice and a reasonable period to come into compliance.

21. Standard Condition No. 12 requires the permittee to install flow metering or other measuring devices to record

withdrawal quantities, when the District deems it necessary to analyze impacts to the water resource or existing users.

IV. CONDITIONS FOR ISSUANCE OF PERMIT

22. Generally, the miniscule withdrawals proposed by Pop's would not fall within the District's permitting authority, which mostly confines itself to withdrawals of 100,000 gpd or more. However, Rule 40D-2.041(1)(c), Florida Administrative Code, requires a permit for any withdrawal from a well having an outside diameter of six inches or more at the surface. DID 1 has an outside diameter of six inches.

23. An applicant for a WUP must demonstrate that the proposed use of water is reasonable and beneficial, is in the public interest, and will not interfere with any existing legal use of water, by providing reasonable assurances on both an individual and a cumulative basis that the proposed use of water satisfies the 14 specific conditions set forth in Rule 40D-2.301(1)(a)-(n), Florida Administrative Code, identified in the subheadings below.

(a) Necessary to Fulfill a Certain Reasonable Demand

24. Pop's is open for business twelve hours per day. During the summer months, it averages 100 customers per day. The tee box and putting green at Pop's are heavily used. When golfers hit balls from the tee box, they make small gouges, or divots, in the Bermuda grass. These divots are later filled

with sand, and the grass naturally grows over them. Irrigation is essential to the health of the Bermuda grass, allowing the application of fertilizer and chemicals to treat for pests and fungus. The tee box and putting green are watered as little as possible, because over-watering can itself lead to fungus problems with the Bermuda grass.

25. The District uses an irrigation allocation computer program called AGMOD to determine reasonable average annual and peak monthly quantities for irrigation in an objective and consistent manner. Data on the pump capacity, soil type, the area to be irrigated, and its geographic location are input, and AGMOD allocates a quantity of water sufficient to irrigate for the driest 20 percent of the time, based on 75 years of historic rainfall data. The AGMOD program allows quantities for irrigation of the fairways of a typical golf course; however, Pop's does not have fairways and thus the proposed permit does not authorize any water for such irrigation.

26. The District's expert, David Brown, credibly testified that the amounts allocated under this permit are conservative because the area to be irrigated is a high traffic area, because the irrigation methodology employed by Pop's ensures that 75 percent of the water withdrawn from DID 1 will get to the grass, because of the fertilizers and chemicals necessary to

maintain and repair the grass, and because of the elevation of the area to be watered. Mr. Brown testified that the AGMOD model uses native soil types, not the fill used to elevate the tee box and putting green, and therefore the soil for the elevated areas will likely require more water and drain more quickly than AGMOD indicated.

27. The quantities allocated for withdrawals from DID 3 on an average annual and peak monthly basis are necessary to fulfill the demand associated with the use of the two restrooms by Pop's employees and customers.

28. In summary, the amounts of water authorized for withdrawal under the proposed permit are no more than necessary to fulfill a certain reasonable demand.

(b) Quantity/Quality Changes Adversely Impacting Resources

29. The evidence at the hearing established that the operation of DIDs 1 and 3 pursuant to the terms of the proposed WUP will cause no quality or quantity changes adversely impacting the water resources. The proposed withdrawal amounts constitute a decrease of 95 percent on an average annual basis and of 96 percent on a peak monthly basis from the existing permit.

30. The District reasonably presumes that decreases in permitted withdrawal amounts will not cause quantity or quality changes that will adversely impact the water resources. Nonetheless, Mr. Brown performed groundwater modeling to confirm that the District's presumption was correct in this case.

31. The first step in model development is to study the geology at the site being studied. Mr. Brown looked at detailed information from surrounding WUPs and geographic logs to arrive at a "vertical" view of the stratigraphic column in place at Pop's, giving him an idea of which zones below Pop's produce water and which zones confine water and impede its movement between the producing units. Mr. Brown then looked to site-specific aquifer test information from other permits to give him an idea of the "horizontal" continuity of the system across the area under study.

32. The hydrogeologic profile at Pop's contains five different aquifer production zones separated by confining units of clay or dense limestone. Moving downward from the surface, the production zones are the surficial aquifer, zones called Production Zone 2 ("PZ-2") and Production Zone 3 ("PZ-3") within the intermediate aquifer, and the Suwannee limestone and Avon Park limestone layers within the Upper Floridan aquifer system.

33. DID 3 has approximately 96 feet of casing and a total depth of approximately 195 feet. It draws water from PZ-2, the upper production zone of the intermediate aquifer.

34. DID 1 was built before the District assumed regulation of well construction and consumptive water use; therefore, the District does not possess specific information as to its construction. Mr. Brown reviewed historical documents, including a 1930s report by the United States Geological Survey ("U.S.G.S.") about irrigation wells drilled in the location now occupied by Pop's. Mr. Brown's review led him to a reasonable conclusion that DID 1 has approximately 75 to 100 feet of casing and is drilled to a total depth of 600 to 700 feet below land surface. The District's water level measurements confirmed Mr. Brown's judgment, indicating that the well penetrates only through the Suwannee limestone formation in the Upper Floridan aquifer.

35. His hydrogeological findings in place, Mr. Brown proceeded to perform a number of analyses using a five-layer groundwater model based on the "Mod-Flow EM" program developed by the U.S.G.S. to determine whether the withdrawals authorized by the proposed WUP would have any adverse impacts on water resources. The model's five layers simulated the five aquifer zones found in the area of Pop's. Mr. Brown

performed simulations to predict the effect of the combined pumping of DID 1 and DID 3 at 1,700 gpd on a steady state basis and at 4,400 gpd for a period of 90 days. A "steady state" model assumes continuous pumping at the stated quantity forever. The scenario for pumping 4,400 gpd for 90 days is called a "transient" model, and simulates the effect of continuous pumping at the peak month quantity, without replenishment of the water source, for the stated period. Both the steady state and transient models used by Mr. Brown were conservative, in that it is unlikely that their scenarios would actually occur at Pop's.

36. The modeling predicted that Pop's withdrawals would have no effect on the surficial aquifer or on the deep Avon Park limestone formation. Because DID 1 is likely to open to the PZ-2, PZ-3, and Suwannee limestone production zones, Mr. Brown analyzed the steady state and transient conditions for each zone. The greatest effect predicted by any of the modeling runs was a drawdown in water levels of approximately two-hundredths of a foot in the PZ-3 and Suwannee limestone zones. This drawdown would extend no farther than the boundary of Pop's property.

37. All of the predicted drawdowns were smaller than the natural fluctuations in water levels caused by changes in barometric pressure. Thus, any possible effects of

withdrawals at the quantities proposed in the WUP would be lost in the background noise of the natural water level fluctuations that occur in all confined aquifers.

38. The water level or pressure within subterranean production zones is referred to as the "head." For water to move from one zone to another, there must be a difference in head between the zones. The evidence established that groundwater quality declines with depth at the Pop's site, but that the heads in the PZ-2, PZ-3, and Suwannee limestone production zones are essentially the same in that area. The similarity in heads means that there is no driving force to move water between the zones and thus no potential for adverse water quality changes caused by DID 1's being open to multiple production zones.

39. In summary, the amounts of water authorized for withdrawal under the proposed permit will not cause quantity or quality changes which adversely impact the water resources, including both surface and ground waters.

(c) Adverse Environmental Impacts to Wetlands, Lakes, Streams, Estuaries, Fish and Wildlife, or Other Natural Resources

40. Mr. Brown's model indicated there would be no drawdown from the surficial aquifer, where there would be the potential for damage to water related environmental features and/or the fish and wildlife using those features as habitat.

Petitioner offered no evidence indicating that the proposed water use will cause adverse environmental impacts.

(d) Deviation from Water Levels or Rates of Flow

41. The District has not established minimum flows or levels for the area including Pop's. Therefore, Rule 40D-2.301(1)(d), Florida Administrative Code, is not applicable to this WUP.

(e) Utilization of Lowest Quality of Water

42. Ninety percent of the water withdrawn from DID 1 will come from the Suwannee limestone formation and is highly mineralized and of lower quality than the water in PZ-2 or PZ-3.

43. DID 3 draws its water from PZ-2. As noted above, DID 3 provides water to the two restrooms on the premises of Pop's. Because its water is used in the public restrooms, DID 3 is considered a limited public supply well, the water from which must meet potable standards. Mr. Brown testified that, though PZ-2 provides water of higher quality than do the zones beneath it, that water only barely meets potable standards. Lower quality water than that obtained from PZ-2 would require extensive treatment to meet potable standards.

44. Reuse or reclaimed water is unavailable to Pop's under any rational cost-benefit analysis. There is a reclaimed water transmission network in Sarasota County, but the nearest point of connection is more than one mile away from Pop's. The wetland lake on Pop's site is unsuitable because extensive land clearing, pipeline construction, and intensive filtration would be required to use its water. Such a project would not be technically or economically feasible for the small amount of water in question.

45. The evidence establishes that Pop's will utilize the lowest quality water available.

(f) Saline Water Intrusion

46. The evidence demonstrated that the proposed use will not significantly induce saline water intrusion. Saline water intrusion occurs in the Avon Park limestone formation. Withdrawals must cause a drawdown in the Avon Park formation to further induce saline water intrusion. DID 1 does not penetrate into the Avon Park formation. Mr. Brown's modeling indicated that the withdrawals allowed under the proposed WUP will not cause any drawdown in the Avon Park formation.

(g) Pollution of the Aquifer

47. The proposed use will not cause pollution of the aquifer. As noted above, absent a difference in head or some driving force, there is no potential for water to be exchanged

between the confined producing zones. Any small quantity that might be exchanged due to the pumping of the well would be removed by the same pumping.

48. There is no potential for pollution of the aquifer by storm water moving through DID 1 or DID 3 because there is no head differential or driving force to move storm water down into the wells. The District's historic water level measurements indicated that during the rainy season, when the site is most likely to be inundated, water levels in the wells are 0.15 feet above land surface. The well structures extend at least one foot above ground level and are sealed with plates and gaskets.

(h) Adverse Impacts to Existing Off-site Land Uses

49. The proposed use will not adversely impact off-site land uses. The District's reasonable practice, when authorizing renewal of the permit for an existing well, is to consider off-site impacts only where the applicant seeks to increase withdrawal amounts. In this case, the applicant is requesting a substantial decrease in the amount of withdrawals allowed under the renewed WUP.

(i) Adverse Impacts to Existing Legal Withdrawals

50. The proposed use will not adversely affect any existing legal withdrawals of water. The District's reasonable practice, when authorizing renewal of the permit

for an existing well, is to consider adverse impacts to existing legal withdrawals only where the applicant seeks to increase withdrawal amounts. In this case, the applicant is requesting a substantial decrease in the amount of withdrawals allowed under the renewed WUP.

51. As noted above, Mr. Brown's modeling indicated that any drawdowns caused by these withdrawals are so small as to be lost within the natural fluctuations of water levels in the aquifer, even at the edge of Pop's 30-acre site. Petitioner's well is more than ten miles away from the wells at Pop's.

(j) Utilization of Local Resources to Greatest Extent Practicable

52. The proposed use of water will use local resources to the greatest extent practicable, because the water withdrawn pursuant to the permit will be used on the property where the withdrawal occurs.

(k) Water Conservation Measures

53. The proposed use of water incorporates water conservation measures. Pop's uses a commercial irrigation system with low volume misters, spray tips and sprinkler heads, and a rain gauge that automatically shuts down the system if one-eighth to one-quarter inch of rain falls. Mr. Perna testified that the automatic shutdown system rarely has

the opportunity to work, because he manually shuts down the system if the weather forecast calls for rain.

54. Mr. Perna testified that the typical golf range irrigates from 30 to 45 minutes per sprinkler head. Pop's irrigates roughly eight minutes per head. Overwatering can cause fungus on the Bermuda grass, giving Pop's a practical incentive to minimize irrigation. Pop's irrigates only the high traffic areas of the tee box and putting green, not the landing area.

55. In its Basis of Review, the District has adopted a water conservation plan for golf courses located in the Eastern Tampa Bay Water Use Caution Area ("WUCA"). Basis of Review 7.2, subsection 3.2. Pop's is located in the Eastern Tampa Bay WUCA, and has implemented the items that golf courses are required to address in their conservation plans.

(l) Reuse Measures

56. Given the small total irrigated area and the efficiency of the irrigation methods employed by Pop's, there is no realistic opportunity to capture and reuse water on the site. There is no reuse water realistically available from other sources. Thus, Pop's incorporates reuse measures to the greatest extent practicable.

(m) Waste

57. Given the reduction in permitted quantities and the limited scope of the irrigation, the proposed use will not cause waste.

(n) Otherwise Harmful to District Resources

58. No evidence was presented that the use of this water by Pop's will otherwise harm the water resources of the District.

V. PETITIONER'S EVIDENCE

59. Petitioner testified on her own behalf and presented the testimony of Ellen Richardson. Ms. Richardson testified that she had once seen a sprinkler running at Pop's during a rainfall, though she conceded that it had just begun to rain when she saw it. Ms. Richardson also testified that she had more than once seen sprinklers running at Pop's during daylight hours. However, Mr. Brown testified that some daytime irrigation is permissible under the District's watering restrictions, where heat stress and applications of fertilizers and chemicals make daytime watering necessary. These conditions applied to Pop's.

60. Petitioner's chief concern was with her own well. Since the late 1980s, she has experienced intermittent water outages. The District has repeatedly worked with Petitioner on her well problems, and Petitioner feels frustrated at the District's inability to solve them. However, the District's

evidence established that Petitioner's problems with water levels in her own well could not possibly be caused or exacerbated by the withdrawals at Pop's, ten miles away. To the extent that the renewal of this WUP will result in drastic decreases in permitted withdrawals, Petitioner's position would be improved even accepting her theory that these withdrawals have some impact on her well.

61. In her petition, Petitioner alleged that there were disputed issues of material fact as to eight of the fourteen permitting criteria discussed above. While she engaged in spirited cross-examination of the District's witnesses, Petitioner offered no affirmative evidence showing that the any of the conditions for issuance of permits were not met.

62. Petitioner's chief attack was that Rule 40D-2.301(1), Florida Administrative Code, requires "reasonable assurances" that the permittee will fulfill the listed conditions, and that the applicant here could not supply "reasonable assurances" because of his long history of failure to comply with the conditions of prior permits. As evidence, Petitioner offered the District's historic record of this permit, which indeed was replete with correspondence from the District requesting records related to pumpage and water quality, and apparent silence from Dr. Kelly in reply.

63. However, the record also explains that the failure to provide data was not the result of obduracy, but because farming had ceased on the property. When the less water intensive use of the driving range commenced approximately nine years ago, the owner ceased monitoring activities. The District, under the impression that farming was still taking place on the property, continued to request pumpage and water quality data for several years after the conversion. It appears from the record that

Dr. Kelly, an absentee landlord, simply did not bother to respond. Dr. Kelly's past discourtesy does not rise to the level of calling into question the reasonable assurances provided in this permit renewal application, particularly where the lessee,

Mr. Perna, has every reason to ensure that the conditions of the WUP are fulfilled.

64. The evidence did not prove that Petitioner participated in this proceeding for an improper purpose--i.e., primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of the permit renewal application. To the contrary, the evidence was that Petitioner participated in this proceeding in an attempt to raise justifiable issues as to why the permit renewal

application should not be granted. In particular, Petitioner raised an important policy issue as to whether an applicant's history of failure to comply with permit conditions should be considered by the District in assessing the reasonableness of the applicant's assurances of future compliance. The District contended that the applicant's compliance history is irrelevant. While the District ultimately prevailed on the substantive issue, its procedural claim of irrelevance was rejected, and Petitioner was allowed to attempt to prove her contention as to Dr. Kelly's noncompliance. It is not found that Petitioner's litigation of this claim was frivolous.

CONCLUSIONS OF LAW

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

66. The District is a water management district in the State of Florida created and existing pursuant to Section 373.069, Florida Statutes, and other applicable law. The District is the governmental agency charged with the responsibility and authority to review and act upon the WUP application at issue, pursuant to Chapter 373, Part II, Florida Statutes, and Chapters 40D-1 and 40D-2, Florida Administrative Code.

67. This permit application is governed by the conditions for issuance found in Chapter 373, Part II, Florida Statutes, and Chapter 40D-2, Florida Administrative Code, and in the Basis of Review for Water Use Permit Applications, dated April 18, 2001 (the "Basis of Review"), adopted by reference in Rule 40D-2.091, Florida Administrative Code.

68. The applicant, asserting an affirmative entitlement to issuance of a water use permit by the District, has the burden of showing by a preponderance of the credible and credited evidence that he is entitled to that permit.

Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 789 (Fla. 1st DCA 1981). In the context of this proceeding, the District undertook the burden of showing that the applicant provided reasonable assurances that the applicable conditions for issuance of the water use permit have been satisfied, in accordance with the applicable statutes and rules and the Basis of Review.

69. If the applicant makes a prima facie showing of reasonable assurances, the burden shifts to Petitioner to present evidence of equivalent quality. J.W.C. Company, 396 So. 2d at 789. Petitioner cannot carry the burden of presenting contrary evidence by mere speculation concerning what "might" occur. Chipola Basin Protective Group, Inc. v.

Department of Environmental Regulation, 11 FALR 467, 480-81 (December 30, 1988).

70. The standard for applicant's burden of proof is one of reasonable assurances, not absolute guarantees, that the applicable conditions for issuance of the permit have been satisfied. Manasota-88, Inc. v. Agrico Chemical Co. and Florida Department of Environmental Regulation, 12 FALR 1319, 1325 (February 19, 1990).

71. "Reasonable assurances" contemplates a substantial likelihood that the project will be successfully implemented. Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

72. In the context of potential for harm to state natural resources, Florida courts have allowed agencies flexibility in interpreting "reasonable assurances" and in applying individual permit standards based upon the totality of the circumstances. Booker Creek Preservation, Inc. v. Mobil Chemical Co., 481 So. 2d 10, 13 (Fla. 1st DCA 1986).

73. The applicant is not required to eliminate all contrary possibilities or to address impacts which are only theoretical and could not be measured in real life; rather, an applicant must provide reasonable assurances which take into account contingencies that might reasonably be expected.

Hoffert v. St. Joe Paper Co., 12 FALR 4972, 4987 (October 29, 1990).

74. To meet his burden, the applicant must meet the requirements of Section 373.223, Florida Statutes, which provides in relevant part:

(1) To obtain a permit pursuant to the provisions of this chapter, the applicant must establish that the proposed use of water:

(a) Is a reasonable-beneficial use as defined in s. 373.019(13);

(b) Will not interfere with any presently existing legal use of water; and

(c) Is consistent with the public interest.

75. "Reasonable-beneficial use" is defined in Section 373.019(13), Florida Statutes, as "the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest."

76. The District has adopted Rule 40D-2.301, Florida Administrative Code, which implements Section 373.223(1), Florida Statutes. In relevant part, Rule 40D-2.301, Florida Administrative Code, provides as follows:

(1) In order to obtain a Water Use Permit, an Applicant must demonstrate that the water use is reasonable and beneficial, is in the

public interest, and will not interfere with any existing legal use of water, by providing reasonable assurances, on both an individual and a cumulative basis, that the water use:

(a) Is necessary to fulfill a certain reasonable demand;

(b) Will not cause quantity or quality changes which adversely impact the water resources, including both surface and ground waters;

(c) Will not cause adverse environmental impacts to wetlands, lakes, streams, estuaries, fish and wildlife, or other natural resources;

(d) Will comply with the provisions of 4.3 of the Basis of Review described in 40D-2.091 [minimum flows and levels];

(e) Will utilize the lowest quality water the Applicant has the ability to use;

(f) Will not significantly induce saline water intrusion;

(g) Will not cause pollution of the aquifer;

(h) Will not adversely impact offsite land uses existing at the time of the application;

(i) Will not adversely impact an existing legal withdrawal;

(j) Will utilize local resources to the greatest extent practicable;

(k) Will incorporate water conservation measures;

(l) Will incorporate reuse measures to the greatest extent practicable;

(m) Will not cause water to go to waste;
and

(n) Will not otherwise be harmful to the water resources within the District.

77. The District has also adopted the Basis of Review, which clarifies and supplements the conditions for issuance of water use permits set forth in Rule 40D-2.301, Florida Administrative Code.

78. Based on the findings of fact set forth above, it is concluded that the District, on behalf of the applicant, established a prima facie case of the applicant's entitlement to the proposed WUP. Petitioner failed to present any evidence relevant to the issues related to the proposed WUP or to prove the facts alleged in her petition.

79. The applicant provided the District with reasonable assurances that the applicable conditions for issuance have been met and thus has established his entitlement to the proposed WUP by a preponderance of the evidence.

80. Petitioner did not provide credible evidence that the proposed WUP would violate any of the applicable permitting statutes or rules, or any other applicable law.

81. Subsequent to the hearing, the District filed a motion for award of attorney's fees and costs, pursuant to Section 120.595, Florida Statutes. The cited statute provides

for an award of attorney's fees and costs to the prevailing party, where it is determined that the non-prevailing adverse party has participated in the proceeding for an improper purpose. "Improper purpose" is defined as "participation in a proceeding

. . . primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity." For the reasons stated in the Findings of Fact above, the District's motion is denied. See, e.g., Paul Still v. New River Solid Waste Association and Department of Environmental Protection, DOAH Case No. 01-1033 (August 7, 2001).

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Southwest Florida Water Management District enter a final order determining that Dr. Thomas E. Kelly has satisfied the requirements of Section 373.223, Florida Statutes, and Rule 40D-2.301, Florida Administrative Code, regarding conditions for issuance of water use permits, and that the District issue Water Use Permit No. 20005687.003 to Dr. Thomas E. Kelly.

DONE AND ENTERED this 27th day of November, 2001, in Tallahassee, Leon County, Florida.

Hearings

LAWRENCE P. STEVENSON
Administrative Law Judge
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Hearings

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this 27th day of November, 2001.

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