

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLEN SPRINGS PRESERVATION)
ASSOCIATION, INC., and)
ELIZABETH T. FURLOW,)
)
Petitioners,)
)
vs.) Case No. 01-3798
)
LUTHER E. BLAKE, JR.; IRENE)
BLAKE CAUDLE; and ST. JOHNS)
RIVER WATER MANAGEMENT)
DISTRICT,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on January 3 and 4, 2002, in Gainesville, Florida.

APPEARANCES

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For Respondents: Ronald A. Carpenter, Esquire
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For Respondent: Charles A. Lobdell, III, Esquire
(District) Jennifer B. Springfield, Esquire
St. Johns River Water Management District
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STATEMENT OF THE ISSUE

The issue is whether an Environmental Resource Permit should be issued to Luther E. Blake, Jr. and Irene Blake Caudle authorizing the construction of a stormwater management system to serve a single-family development known as Walnut Creek, Phases I and II, in Gainesville, Florida.

PRELIMINARY STATEMENT

This matter began on August 15, 2001, when Respondent, St. Johns River Water Management District, issued its Written Notice of Intended District Decision on Permit Application 42-001-71000-1 authorizing Respondents, Luther E. Blake, Jr. and Irene Blake Caudle, to construct a stormwater management system for a single-family residential subdivision in Gainesville, Florida. On September 7, 2001, Petitioners, Glen Springs Preservation Association, Inc., and Elizabeth T. Furlow, filed a Petition for Administrative Hearing challenging the issuance of the permit. The matter was referred to the Division of Administrative Hearings on September 26, 2001, with a request that an Administrative Law Judge be assigned to conduct a hearing.

By Notice of Hearing dated October 12, 2001, a final hearing was scheduled on January 3 and 4, 2002, in Gainesville, Florida.

Petitioners' Motion to Continue the hearing was denied by Order dated December 20, 2001. A second Motion to Continue filed by Petitioners at the outset of the hearing was also denied.

At the final hearing, Petitioners presented the testimony of Dr. Leonard T. Furlow, Jr.; Dr. W. Herbert Platt; Dr. John D. Dame; Bonnie O'Brien; Dr. Merrill Wilcox; William R. Reck, a professional engineer accepted as an expert; and Stephen Boyes, a hydrogeologist accepted as an expert. Also, they offered Petitioners' Exhibits 1, 1A, 2, 25, and 26, which were received in evidence. Respondent, St. Johns River Water Management District, presented the testimony of Dr. Chou Fang, a professional engineer accepted as an expert, and Michael A. Register, III, director of the Division of Water Resources accepted as an expert. Also, it offered District Exhibits 1-5, 8, and 10, which were received in evidence. Respondents, Luther E. Blake, Jr. and Irene Blake Caudle, presented the testimony of H. Jerome Kelley, a professional engineer accepted as an expert, and M. Fred Rwebyogo, a professional engineer accepted as an expert. Also, they offered Applicants' Exhibits 1-5 and 7-9, which were received in evidence. Finally, the undersigned took official recognition of the St. Johns River Water Management District Applicant's Handbook: Regulation of Stormwater Management Systems and Chapter 40C-42, Florida Administrative Code.

The Transcript of the hearing (four volumes) was filed on January 23, 2002. Proposed Findings of Fact and Conclusions of Law were filed by Petitioners and by the St. Johns River Water Management District on February 4, 2002, and they have been considered by the undersigned in the preparation of this Recommended Order.¹

FINDINGS OF FACT

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

a. Background

1. In this environmental permitting dispute, Respondent, St. Johns River Water Management District (District), proposes to issue an Environmental Resource Permit to Respondents, Luther E. Blake, Jr. and Irene Blake Caudle (Applicants), authorizing the construction of a stormwater management system to serve Phases I and II of a single-family development known as Walnut Creek Subdivision in Gainesville, Florida.

2. The system will be located on a 31-acre, L-shaped parcel of undeveloped, forested land. The proposed system includes a 135-lot single family subdivision, internal roadways with curb and gutter, a storm sewer system, and five dry retention ponds. The project site is located west of Northwest 13th Street (Highway 441) in the northwestern portion of the City of Gainesville between Northwest 39th Avenue (State Road 222) and Northwest 31st

Boulevard, west of Palm Grove Subdivision, and east of Hidden Pines Subdivision.

3. Petitioner, Glen Springs Preservation Association, Inc. (Association), is a corporation made up of an undisclosed number of persons, at least one of whom resides adjacent to or near the proposed project site. Petitioner, Elizabeth T. Furlow (Furlow), who did not indicate that she is a member, also resides with her husband near the project site. As set forth in the parties' Prehearing Stipulation, Petitioners contend that the proposed system fails to meet certain design and performance criteria, that the Applicants have failed to submit the appropriate documentation to satisfy the operation and maintenance entity requirements, and that the Applicants have failed to provide reasonable assurance that the system meets the general requirements for issuance of a permit. More specifically, they contend that the requirements of Rules 40C-42.023(1)(a)-(c), 40C-42.025(1), (3), (4), (5), (6), (7), (8), and (10), 40C-42.026(1)(a), (c), and (d), and 40C-42.027, Florida Administrative Code, have not been met.² On these technical issues, the parties have presented conflicting expert testimony, and the undersigned has accepted the more credible and persuasive testimony, as set forth in the findings below.

4. Respondents have not stipulated to Petitioners' standing. Through the testimony of Furlow's husband, it was established that the Furlows live just south of the project site, approximately 100

yards north of Northwest 31st Boulevard near a creek known as Glen Springs Creek (Creek). The Furlows fear that if a permit is issued, runoff from the project site will cause further erosion of the Creek's banks and flooding during rainfall events.

5. Although three persons who live adjacent to or near the project site appeared as witnesses, only one (Bonnie O'Brien) indicated that she is a member of the Association. Ms. O'Brien has lived just west of the Creek since 1969, around one-half mile from the project site. Over the years, and due to erosion caused by increasing development in the area, much of which began before the District began permitting stormwater systems, the Creek's banks have increased in depth from around a foot or so to as much as six feet. During large storm events, the Creek's waters rise up to as much as five feet in depth. Like the Furlows, Ms. O'Brien fears that runoff from the project will go into the Creek and adversely affect her property. There was, however, no evidence concerning the Association's interests, whether the Association is a Florida corporation, the number of members in the Association, and except for Ms. O'Brien, whether any of its members are substantially affected by the proposed activity.³

b. Design and performance criteria

6. The Applicants propose to use a dry retention system consisting of five dry retention ponds ranging in depth from three to four and one-quarter feet which will be located mainly along

the western boundaries of the project site. In general terms, stormwater runoff from the residential lots will sheet flow to roadways and alleys, will be collected by curbs and gutters, and then will be conveyed to the five ponds for water quality treatment.

7. Rule 40C-42.025(1) requires that "[e]rosion and sediment control best management practices shall be used as necessary during construction to retain sediment on-site." The more persuasive evidence shows that the applicants have done so, and that the best management practices used by the Applicants are generally utilized throughout the development community. Therefore, the requirements of this rule have been met.

8. Rule 40C-42.025(3) provides that unless applicable local regulations are more restrictive, "[n]ormally dry basins designed to impound more than two feet of water or permanently wet basins shall be fenced or otherwise restricted from public access." The proposed retention basins that have three-to-one (horizontal: vertical) side slopes will be fenced to prevent public access. The evidence also shows that there are no applicable, more restrictive local regulations.

9. Under Rule 40C-42.025(4), "[a]ll stormwater basin side slopes shall be stabilized by either vegetation or other materials to minimize erosion and sedimentation of the basins." As to this requirement, the evidence establishes that all of the stormwater

basin side slopes will be stabilized by vegetation to minimize erosion and sedimentation of the basins, as required by the rule. Further, the proposed retention basin side slopes are four-to-one and three-to-one. Slopes of this dimension are typically stable and will not easily erode.

10. Rule 40C-42.025(5) requires that the systems be designed so that they "accommodate maintenance equipment access" and "facilitate regular operational maintenance." The evidence shows that the Applicants own the entire project site, and each of the five retention ponds can be accessed from roads and alleys within the project site.

11. Rule 40C-42.025(6) requires that an applicant "obtain sufficient legal authorization as appropriate prior to permit issuance for stormwater management systems which propose to utilize offsite areas to satisfy the requirement in subsection 40C-42.023(1), F.A.C." Because the Applicants are not proposing to use any offsite areas for the system, and the system is located entirely on the project site, no "legal authorization" from other persons is required.

12. Under Rule 40C-42.025(7), the system "shall provide gravity or pumped discharge that effectively operates under . . . [m]aximum stage in the receiving water resulting from the mean annual 24-hour storm." Calculations performed by the Applicants, and verified by the District's independent calculations, show that

the system is designed to retain all of the runoff from the mean annual 24-hour storm event. Therefore, this rule has been satisfied.

13. Rule 40C-42.025(8) provides that if a system serves a new construction area with greater than 50 percent impervious surface, an applicant is required to demonstrate that "post-development peak rate of discharge does not exceed the pre-development peak rate of discharge" for the mean annual 24-hour storm event. If the system serves a new construction area with less than 50 percent impervious surface, however, the requirements of this rule do not apply.

14. The evidence shows that the proposed retention system will serve a new construction area (around 12 acres) with less than 50 percent impervious area. Therefore, the rule does not apply. Even so, the Applicants demonstrated that the post-development peak rate of discharge from the project site will not exceed the pre-development peak rate of discharge for the 24-hour storm event. In fact, the post-development peak rate of discharge from the project site during the 24-hour mean annual storm event will be zero.

15. Finally, Rule 40C-42.025(10) requires in part that the construction plans and supporting calculations be "signed, sealed, and dated by an appropriate registered professional." The evidence shows that the final set of plans submitted in January

2002 by the Applicants was signed and sealed by H. Jerome Kelly, a professional engineer.⁴

c. Specific design and performance criteria

16. Rule 40C-40.026(1)(a) requires that the retention system provide retention of stormwater runoff in one of four ways. Here, the Applicants have designed the system to provide "[o]n-line retention of an additional one half inch of runoff from the drainage area over the volume specified in subparagraph 1. above." Subparagraph 1. requires "[o]ff-line retention of the first one half of runoff or 1.25 inches of runoff from the impervious area, whichever is greater[.]" Because the system will provide on-line retention of a minimum of one inch of runoff from the project area, plus 1.25 inches of runoff from the impervious soil in the project/drainage area, it is found that the capacity of the proposed retention system is more than adequate to capture the quantity of stormwater runoff required by this rule.

17. Under Rule 40C-42.026(1)(c), the system must be designed to "[p]rovide the capacity for the appropriate treatment volume of stormwater specified in paragraphs (a) and (c) above, within 72 hours following the storm event assuming average antecedent moisture conditions." To assure compliance with this rule, and to demonstrate that the system meets the required recovery of the water quality treatment volume, the District performed modeling to predict the vertical infiltration rate and the groundwater

mounding effects of the proposed retention system. For the reasons stated below, it is found that the system will provide the required amount of treatment volume capacity within 72 hours of a storm event assuming average antecedent moisture conditions, as required by the rule.

18. The District used one of the latest versions of the MODRET computer modeling program, a methodology routinely used by the District to support an application for this type of retention system. That program takes into account vertical percolation into the soil; once the water reaches the water table, the model then takes into account the lateral or horizontal movement of the water out of the pond. The model is used to determine whether the required water quality treatment volume, which is significantly less than the storage volume in the ponds, will draw down within three days. The modeling confirmed that this requirement will be satisfied. Data from the Applicants' on-site soil survey was used in the model to establish the depth below ground surface of the seasonal high water table level. This resulted in a conservative assumption of an above-normal average antecedent moisture condition beneath the retention ponds.

19. The Applicants also collected soil samples from the project site, including those areas where the retention ponds will be located, and they performed laboratory tests in accordance with ASTM D2434 to calculate the vertical hydraulic conductivity and

the horizontal hydraulic conductivity for those soils. The results of both tests fall within accepted ranges as stated in the published soils texts and governmental soils surveys for the project area.

20. In addition, the Applicants conducted an independent test to determine the mean seasonal high water table on the project site. Based on visual observations of the soil samples, the Applicants determined that the mean seasonal high water table is between six and seven feet below ground surface. The visual observation of the soil samples is compatible with the results of Petitioners' soil augers obtained off the project site.

21. As noted earlier, the proposed retention ponds will have a depth of three to four and one-quarter feet, which places the bottom of the ponds above the mean high water table as determined by the Applicants' calculations and as stated in the soils survey for Alachua County. Therefore, the dry retention ponds should not be considered impervious surfaces.

22. Finally, Rule 40C-42.026(1)(d) requires that the retention system "[b]e stabilized with pervious material or permanent vegetation cover." The evidence shows that the proposed retention system will be stabilized with permanent vegetative cover.

d. Other requirements and concerns

23. Runoff from other developed properties in the vicinity of the proposed project site discharges into the Creek, contributing to erosion in the Creek. Not all of these existing developments have stormwater management systems on-site, since some of the older properties were built before the District assumed regulation over this activity.

24. The proposed system can be effectively operated and maintained without causing or exacerbating the erosion problems that currently exist within the Creek system. This is because once the system is built, the amount of runoff leaving the site will be less than what is now present in the pre-development state. Thus, the project, as now designed, will not adversely affect drainage and flood protection on adjacent or nearby properties.

25. Through the submission of a copy of the Articles of Incorporation and Declaration of Covenants for the Walnut Creek Homeowner's Association, the Applicants demonstrated that the District's requirements regarding the operation and maintenance of the proposed system after completion of construction will be met, as required by Rule 40C-42.027(4).

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2001).

27. As the applicants in this cause, Luther E. Blake, Jr., and Irene Blake Candle bear the burden of showing by a preponderance of the evidence that they are entitled to the requested permit. See, e.g., Cordes v. State, Dep't of Envir. Reg., 582 So. 2d 652, 654 (Fla. 1st DCA 1991).

28. In order for an association to demonstrate standing, it must show that a "substantial number of its members, although not necessarily a majority, are 'substantially affected' by the challenged [action]"; that "the subject matter of the [proposed agency action is] within that association's general scope of interest and activity"; and that the "relief requested must be of the type appropriate for a[n] . . . association to receive on behalf of its members." Fla. Home Builders Ass'n v. Dep't of Labor and Employ. Sec., 412 So. 2d 351, 353-54 (Fla. 1982). Except for the testimony of one member, and the impact of the project on her property, there was no evidence regarding the number of members of the Association, whether a substantial number of the members are substantially affected by the District's intended action, the Association's general scope of interest and activity, and whether the requested relief is of a type

appropriate for an association to receive on behalf of its members. This being so, the Association has failed to demonstrate standing to challenge the proposed agency action.

29. As to Ms. Furlow, through the testimony of her husband, she has demonstrated that she will be substantially affected by the proposed agency action, and therefore she has standing to bring this action.

30. Rule 40C-42.023, Florida Administrative Code, sets forth the general requirements for issuance of a permit for a stormwater management system. The relevant requirements are as follows:

(1) To receive a general or individual permit under this chapter the applicant must provide reasonable assurance based on plans, test results and other information, that the stormwater management system:

(a) Will not result in discharges from the system to surface and ground water of the state that cause or contribute to violations of state water quality standards as set forth in chapters 62-302, 62-4, 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.;

(b) Will not adversely affect drainage and flood protection on adjacent or nearby properties not owned or controlled by the applicant; [and]

(c) Will be capable of being effectively operated and maintained pursuant to the requirements of this chapter[.]

Petitioners contend that the Applicants have failed to give reasonable assurance that these requirements have been met.

31. In addition, Chapter 40C-42, Florida Administrative Code, governs stormwater management systems of the type proposed by the Applicants. Of relevance here are Rules 40C-42.025 and 40C-42.026, Florida Administrative Code, which set forth design and performance criteria and specific design and performance criteria, respectively, which apply to stormwater management systems. As reflected in the parties' Prehearing Stipulation, Petitioners contend that eight design and performance criteria (subsections (1), (3)-(8), and (10)) and three specific design and performance criteria (paragraphs (1)(a), (c), and (d)) have not been satisfied.

32. Finally, Rule 40C-42.027(4), Florida Administrative Code, requires that the owner or developer must submit documentation to demonstrate that the responsible entity (in this case, a homeowners' association) meets the operation and maintenance entity requirements.

33. By a preponderance of the evidence, the Applicants have established that the system complies with all design and performance criteria, including those concerning erosion and sediment control, fencing, side slope stabilization, maintenance access, tailwater condition, and the signing and sealing of the construction plans. The evidence also shows that Subsections (6) and (8) do not apply. This is because the Applicants do not propose to use any offsite areas to satisfy the requirements of

Rule 40C-42.023(1), and the proposed system will not serve a new construction area with greater than a 50 percent impervious surface.

34. By a preponderance of the evidence, the Applicants have also shown that the system complies with all specific design and performance criteria, including the ability to retain the required water quality treatment volume and to recover its capacity within 72 hours of a rainfall event. Further, the system will be stabilized with permanent vegetative cover.

35. The preponderance of the evidence shows that the requirements of Rule 40C-42.023(1)(a)-(c) have been met, and that reasonable assurance has been given by the Applicants for issuance of a permit. Likewise, the more persuasive evidence shows that the requirements of Rule 40C-42.027 have also been met. This being so, the permit should be issued.

RECOMMENDATION

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

RECOMMENDED that the St. Johns River Water Management District enter a final order granting application number 42-001-71000-1 of Luther E. Blake, Jr. and Irene Blake Caudle for an Environmental Resource Permit.

DONE AND ENTERED this 14th day of February, 2002, in
Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of February, 2002.

ENDNOTES

- 1/ Respondents, Luther E. Blake and Claudia Blake Caudle, have adopted by reference the Proposed Recommended Order submitted by the District.
- 2/ In their Proposed Recommended Order, Petitioners now concede that the requirements of Rules 40C-42.025(1), (4), and (5), 40C-42.026(1)(d), and 40C-42.027 have been met.
- 3/ Although the initial Petition contains allegations concerning these matters, there was no supporting proof.
- 4/ The rule simply contemplates that the plans be signed and sealed by a licensed professional. The fact that the plans may contain an erroneous calculation, as Petitioners suggest, does not render the sealing invalid.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.