SJR 2002-09

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

GLEN SPRINGS PRESERVATION ASSOCIATION, INC., and ELIZABETH T. FURLOW,

Petitioners,

v.

DOAH Case No. 01-3798
SJRWMD No. 2001-119

LUTHER E. BLAKE, JR.; IRENE BLAKE CAUDLE; and ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondents.

FINAL ORDER

On February 14, 2002, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") rendered his RECOMMENDED ORDER in this matter. A copy of RECOMMENDED ORDER is attached as Exhibit "A".

STATEMENT OF THE ISSUE

The issue in this case is whether the application of Luther E. Blake, Jr. and Irene Blake Caudle, ("Applicants") for a stormwater permit should be approved pursuant to Chapter 373, Florida Statutes, and Chapter 40C-42, Florida Administrative Code ("F.A.C.").

BACKGROUND

On August 15, 2001, the Applicants applied to the St. Johns River Water Management District ("District") to construct a stormwater management system to serve Phases I and II of a single-family development known as Walnut Creek Subdivision in Gainesville, Florida. The proposed construction site is a thirty-one acre parcel of undeveloped land located in the northwestern part of the city. 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.

On August 15, 2001, the District issued its Notice of Intent to Issue a Stormwater Permit (TSR) regarding application number 42-001-71000-1. Petitioners Glen Springs Preservation Association, Inc., and Elizabeth T. Furlow, (collectively "Petitioners"), filed a timely petition challenging the District's proposed permit. The matter was forwarded to DOAH, and Administrative Law Judge Donald R. Alexander was assigned to the case. The ALJ conducted a formal administrative hearing on January 3 and 4, 2002. The RECOMMENDED ORDER recommended that the Governing Board grant the permit application.

Petitioners filed exceptions to the RECOMMENDED ORDER, but in the wrong forum; they filed them with DOAH's Clerk rather than the District Clerk. On March 8, 2002, Petitioners faxed to the District Clerk a MOTION TO SET ASIDE EXCLUSION OF THE EXCEPTIONS TO THE PROPOSED ORDER, and on March 11, the same day the District filed its response to that motion, Petitioners filed their Exceptions with the District Clerk.

In essence, Petitioners' MOTION TO SET ASIDE EXCLUSION OF THE EXCEPTIONS TO THE PROPOSED ORDER constitutes a request that Petitioners be allowed to file their Exceptions late. The motion, supported by an affidavit from Petitioners' attorney's legal assistant, sets forth facts showing that the attorney's filing instructions were susceptible of two interpretations, and that the wrong interpretation, filing at DOAH, was chosen by the legal assistant. At our regularly scheduled Governing Board meeting on March 12, 2002, we concluded that Petitioners' late-filed Exceptions should be considered as filed on time, with a filing date of March 11, 2002, based on the doctrine of "excusable neglect." That ruling was to be reflected in this Final Order. The District, joined by the Applicants, filed a timely response to PETITIONERS' EXCEPTIONS. This matter came before the Governing Board on April 9, 2002 for final agency action.

STANDARD OF REVIEW

The Governing Board's authority to act on a Recommended Order is set forth in section 120.57(1)(l), Florida Statutes. Upon receipt of an ALJ's recommended order, the Governing Board has essentially three alternatives: it may (1) adopt the recommended order as the agency's final order; (2) reject or modify findings of fact, but only if it determines from the record that the findings of fact were not based on competent substantial evidence; (3) reject or modify the conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. Under the latter two alternatives, the Governing Board issues a final

order consistent with the rejected or modified factual findings or conclusions of law.

With regard to findings of fact, the ALJ, not the Governing Board, is the fact finder. Goss v. Dist. Sch. Bd. of St. Johns County, 601 So.2d 1232 (Fla. 5th DCA 1992); Heifetz v. Dep't of Bus. Regulation, 475 So.2d 1277 (Fla. 1st DCA 1988). If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. Freeze v. Dep't of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990); Berry v. Dep't of Envtl. Regulation, 530 So.2d 1019 (Fla. 4th DCA 1998). The Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. Goss, *supra*; Heifetz, *supra*; Brown v. Criminal Justice Standards & Training Comm'n., 667 So.2d 977 (Fla. 4th DCA 1996). The issue is not whether the record contains evidence contrary to the findings of fact in the Recommended Order, but whether the ALJ's finding is supported by any competent substantial evidence. Florida Sugar Cane League v. State Siting Bd., 580 So.2d 846 (Fla. 1st DCA 1991). . "Competent substantial evidence" is such evidence as is sufficiently relevant and material that a reasonable mind would accept as adequate to support the conclusion reached. Perdue v. TJ Palm Associates, Ltd., 755 So.2d 660, 665 (Fla. 4th DCA 1999). Competent substantial evidence relates not to the quality, character, convincing power, probative value or weight of the evidence, but refers to the existence of some quantity of evidence as to each essential

element and as to the legality and admissibility of that evidence. Scholastic Book Fairs v. Unemployment Appeals Commission, 671 So.2d 287, 289 (Fla. 5th DCA 1996). If competent substantial evidence supports a factual finding, the finding cannot be modified or rejected.

RULINGS ON THE PETITIONERS' EXCEPTIONS

Petitioners' EXCEPTIONS TO THE RECOMMENDED ORDER ("PETITIONERS' EXCEPTIONS") do not separately identify Petitioners' concerns as numbered exceptions. Instead, PETITIONERS' EXCEPTIONS discusses RECOMMENDED ORDER paragraph 28 under the heading "Standing of Glen Springs Preservation Association, Inc." and discusses five different RECOMMENDED ORDER paragraphs under the heading "Compliance with District Permitting Criteria." Significantly, Petitioners do not challenge any finding of fact on the ground that the finding is not based on competent substantial evidence. We will first address Petitioners' exception to paragraph 28, and then address, in sequential order, the exceptions to Recommended Order paragraphs 11, 13, 24, 33, and 35.[1]

Exception Regarding Standing (conclusion of law paragraph 28).

The ALJ specifically found that "Respondents have not stipulated to Petitioners' standing." RECOMMENDED ORDER ¶4. He also concluded that Petitioners did not present the evidence necessary to prove the standing of Glen Springs

[1] PETITIONERS' EXCEPTIONS, under the heading "Compliance with District Permitting Criteria," discusses the Recommended Order paragraphs in the following sequence: 24, 33, 35, 13, and 11.

Preservation Association. RECOMMENDED ORDER ¶28. Although Petitioners explicitly take exception to paragraph 28, they do not mention paragraph 4. However, their assertion that the District and Applicant agreed, off-the-record, to Petitioners' standing (PETITIONERS' EXCEPTIONS ¶2), can be fairly read as an exception to the finding in paragraph 4, and we will treat it as such.

The claimed off-the-record agreement as to standing is based on the alleged silence of the District and Applicants when the ALJ allegedly asked if there were any issues related to standing. As support for the alleged agreement, PETITIONERS' EXCEPTIONS incorporated affidavits from two persons who were present when the question was purportedly asked and not answered. Notably, there is no affidavit from Petitioners' attorney stating that he interpreted the Applicants and District's silence to signify agreement that they would not contest standing. The absence of such an affidavit is consistent with Petitioners' Proposed Recommended Order, which was signed by Petitioners' attorney and filed after the alleged agreement as to standing. The Proposed Recommended Order specifically discusses "the issue as to whether or not Petitioners have standing in the case." (Petitioners' Proposed Recommended Order at ¶13). The inclusion of the standing issue in Petitioners' Proposed Recommended Order suggests that Petitioners' attorney did not consider there to be an agreement to accept Glen Springs Preservation Association's standing. Furthermore, the ALJ apparently did not interpret whatever transpired as an agreement; otherwise, he would not find that there was no stipulation as to standing.

As discussed in the Standard of Review section, we cannot reject a finding of fact if it is supported by competent substantial evidence. The parties PREHEARING STIPULATION listed the Petitioners' standing as an issue for determination by the ALJ. *See* PREHEARING STIPULATION at ¶8(a). The PREHEARING STIPULATION, dated less than a week before the alleged oral agreement as to standing, provides competent substantial record evidence that Petitioners' standing was at issue. If a party wishes to rely on an off-the-record discussion, it is incumbent on the party's representative to make sure that the discussion is subsequently placed on the record.

Petitioners suggest that their answers to District's Interrogatories prove up the standing of Glen Springs Preservation Association (PETITIONERS' EXCEPTIONS ¶3). However, those answers were not introduced into evidence at the administrative hearing. Interrogatory answers that are not introduced into evidence are not part of the evidentiary record and cannot constitute competent substantial evidence to support a finding of fact. Coca-Cola Bottling Co. v. Clark, 299 So.2d 78, 82 (Fla. 1st DCA 1974) (written interrogatories "do not become a part of the evidence to be considered in resolving the trial issues unless properly offered and received into evidence"). Petitioners cannot now attempt to supplement the evidentiary record to show that the ALJ erred. "To allow a party to produce additional evidence after the conclusion of an administrative hearing below would set in motion a never-ending process of confrontation and cross-examination, rebuttal and surrebuttal evidence, a result not contemplated by the Administrative Procedures Act." Collier

Medical Center, Inc. v. State, Dept. of Health and Rehabilitative Services, 462 So.2d 83, 86 (Fla. 1st DCA 1985). Accordingly, we reject this exception.[2]

Exception to Finding of Fact Paragraph 11

Petitioners ask the Governing Board to modify RECOMMENDED ORDER paragraph 11, which finds that the Applicants do not propose to use offsite areas to satisfy the applicable permitting requirements:

> 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.

RECOMMENDED ORDER ¶11. Petitioners contend that Applicants are proposing to use offsite areas as part of their stormwater system (PETITIONERS' EXCEPTIONS ¶13). The basis for Petitioners' contention is the purported fact that a 25 year, 24 hour storm event will cause one of the five proposed stormwater ponds to discharge through a concrete pipe into a swale, which will then discharge into Glen Springs Creek, which is offsite (PETITIONERS' EXCEPTIONS ¶14). Thus, argue Petitioners, the Applicants are using offsite property, Glen Springs Creek, to satisfy the applicable

[2] Our rejection of this exception has no bearing on the merits of the remaining exceptions because the other petitioner, Elizabeth T. Furlow, also raised those exceptions, which we address below.

requirement in subsection 40C-42.023(1).[3] There are several reasons we must reject this exception.

First, the ALJ did not make a factual finding that a 25 year, 24 hour storm event will actually result in a discharge into Glen Springs Creek. Nor did he find that if there were to be such a discharge, that discharge would be greater than the pre-development discharge for a 25 year, 24 hour storm event. When reviewing a DOAH recommended order, we have no authority to make independent, supplementary findings of fact. *See, e.g.,* Manasota 88, Inc. v. Tremor, 545 So.2d 439, 441 (Fla. 2d DCA 1989); Friends of Children v. Dept. of H.R.S., 504 So.2d 1345, 1348 (Fla. 1st DCA 1987). Thus, we cannot make a finding that discharges from the proposed system to Glen Springs Creek will occur during a 25 year, 24 hour storm event.[4] Second, even if we could make this supplemental finding, it would be irrelevant to the pending permit application, because the 25 year 24 hour storm event is not the benchmark to be used in determining compliance with subsection 40C-42.023(1).

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[3] Subsection 40C-42.023(1) contains requirements relating to water quality, water quantity (flooding), operation and maintenance, and possibly special basin criteria for projects located within the special basins identified in Chapter 40C-41, F.A.C. Petitioners' exception relates to the water quantity requirement (Petitioners' Exceptions ¶¶10-14).

[4] Petitioners cite Dr. Fang's testimony (Vol. I at pp 132-33) as support for this asserted fact (PETITIONERS' EXCEPTIONS ¶12). Although, Dr. Fang testified that "[f]or Basin A, the 25 year, 24 hour total runoff volume exceeds the storage volume," he did not testify that discharges would reach Glen Springs Creek or that the post-development peak rate of discharge would exceed the pre-development peak rate of discharge for the 25 year, 24 hour storm.

There is no District regulation that requires use of a 25 year, 24 hour storm event to determine compliance with subsection 40C-42.023(1). Paragraph 40C-42.023(1)(c) contains the permitting requirement that Petitioners believe the Applicants failed to meet. That paragraph requires an applicant to demonstrate that a proposed system "will not adversely affect drainage and flood protection on adjacent or nearby properties not owned or controlled by the applicant." Applicants invariably address this requirement by demonstrating that the stormwater management system complies with the criteria in subsection 40C-42.025(8), F.A.C. Subsection 40C-42.025(8) states, in pertinent part,

> Stormwater management systems which require a permit . . . which serve new construction area with greater than 50 percent impervious surface (excluding water bodies) must demonstrate that the post-development peak rate of discharge does not exceed the pre-development peak rate of discharge for one of the following:
>
> (a) The mean annual 24-hour storm event. . . .
>
> (b) The mean annual 24-hour storm event utilizing the modified rational hydrograph method. . . .
>
> (c) As an alternative to paragraphs (a) or (b), above, the applicant may propose a storm event, duration, and criteria specified by a local government, state agency, or stormwater utility with jurisdiction over the project.

It is the mean annual 24-hour storm event, not the 25 year, 24 hour storm event that is referenced in the rule. In accordance with the rule, the ALJ specifically found that "the post-development peak rate of discharge from the project site during the 24-hour mean annual storm event will be zero." RECOMMENDED ORDER

¶14. The Petitioners did not take exception to this finding. Accordingly, the 25 year, 24 hour storm event is not relevant to the permit application at issue. In order to grant this exception, we would have to disregard existing subsection 40C-42.025(8) and substitute in its place a new permitting standard founded on the 25 year, 24 hour storm event. We cannot ignore our existing regulations. An agency is obligated to follow its own rules. Vantage Healthcare Corp. v. Agency for Health Care Admin., 687 So.2d 306, 308 (Fla. 1st DCA 1997).

Even if discharges from the proposed system to Glen Springs Creek will occur during large storm events, that fact would not cause Glen Springs Creek to become part of the system. Most systems discharge to a receiving waterbody during large storms. The relevant permitting question is whether offsite areas are proposed to be used to prevent the post-development peak rate of discharge from exceeding the pre-development peak rate of discharge during the 24-hour mean annual storm event. The ALJ'S finding that there will be no post-development discharge from the project site during the 24-hour mean annual storm means that Glen Springs Creek or other off-site areas will not be utilized to satisfy the requirement in subsection 40C-42.023(1).

For the forgoing reasons, Petitioners' request that we modify paragraph 11 is rejected.

Exception to Finding of Fact Paragraph 13

In RECOMMENDED ORDER paragraph 13, the ALJ states:

> 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.

This is an accurate recitation of the contents of rule 40C-42.025(8), and Petitioners do not suggest that paragraph 13 misstates that rule. Nevertheless, Petitioners ask us to modify paragraph 13 to require the applicant to meet section 40C-42.025(8), F.A.C., because the amount of impervious surface allegedly exceeds 50% of the site (PETITIONERS' EXCEPTIONS ¶11).

Petitioners' claim that the proposed project's impervious surfaces exceed 50% of the site is contrary to the ALJ's finding in the first sentence of RECOMMENDED ORDER paragraph 14: "[t]he evidence shows that the proposed retention system will serve a new construction area (around 12 acres) with less than 50 percent impervious area." Petitioners do not take exception to this finding and do not contend in their Exceptions that the finding is not based on competent substantial evidence. In fact, the opposite is true; competent substantial evidence supports the finding. (Fang, Transcript Vol. I at 67, 75; Register, Transcript Vol. II at 184, 188, 189, 205). Consequently, there is no basis for us to reject the ALJ's finding that the amount of impervious surface is less than 50%.

Since the amount of impervious surface is less than 50%, the Applicant was not required to demonstrate that the post-development peak rate of discharge does not

exceed the pre-development peak rate of discharge. Nevertheless, the District did analyze and present testimony regarding the 24-hour mean annual storm, the storm that would be analyzed if the proposed project were to have greater than 50% impervious surface. (Fang Vol. I at 73-75; Register Vol. II at 182-183, 205-206, 213-214, Applicants' Ex. 1-4, District's Ex. 4, Petitioners' Ex. 1A). Petitioners did not offer any evidence to the contrary. As found by the ALJ, after noting the project was less than 50% impervious,

> [e]ven 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.

The evidence demonstrated that the proposed project meets the rule 40C-42.025(8) test regarding pre and post-development peak rates of discharge for the 24-hour mean annual storm event, even though that requirement did not apply to the proposed project. Thus, the very thing requested by Petitioners in their exception–that the project be analyzed under the rule 40C-42.025(8) 24-hour mean annual storm criteria–has occurred. For these reasons, the exception to paragraph 13 is denied.

Exception to Finding of Fact Paragraph 24

Petitioners take exception to RECOMMENDED ORDER paragraph 24 because the "applicant [sic] has not provided the required standard of proof" that the system

will not adversely affect drainage or flood protection on adjacent or nearby properties (PETITIONERS' EXCEPTIONS ¶7). In paragraph 24, the ALJ found that:

> [t]he 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.

Testimony and exhibits admitted into evidence provide competent substantial evidence that the proposed system will not adversely affect drainage and flood protection on adjacent or nearby properties. (Fang Vol. I: 62-64, 71, 73-75, 95-97, 109, 111-113, 129-130, 161; Register Vol. II: 182-183, 185-187, 190, 197-202, 205-206, 213-214; Applicants' Ex. 1-5). Petitioners do not assert that this supporting competent substantial evidence is lacking, merely that the Applicants did not carry their burden of proof.

The standard of proof applicable to this proceeding is a preponderance of the evidence. §120.57(1)(j), Florida Statutes. The Administrative Law Judge, after hearing the testimony and considering the weight of the evidence and credibility of the witnesses, determined that the Applicants met their burden. We cannot second-guess the ALJ on his view of the weight of the evidence. Perdue v. TJ Palm Associates, Ltd., 755 So.2d 660, 665 (Fla. 4th DCA 1999) ("administrative agency is not authorized to weigh or reweigh the evidence presented, judge the credibility of witnesses, or otherwise interpret the evidence"); South Florida Cargo

Carriers Ass'n, Inc. v. State, Dept. of Business & Professional Regulation, 738 So.2d 391, 394 (Fla. 3rd DCA 1999) ("reviewing agency may not reweigh the evidence, resolve the conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of the ALJ as the finder of the facts"); *see also* Heifetz v. Department of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1988) (agency cannot reweigh evidence in reviewing a recommended order). In light of the competent substantial evidence that supports the ALJ's finding and our inability to reweigh the testimony and other evidence, we cannot modify RECOMMENDED ORDER paragraph 24. Therefore, we must reject Petitioners' exception to that paragraph.

Exception to Conclusion of Law Paragraphs 33 and 35

Petitioners ask us to modify conclusion of law paragraphs 33 and 35 by rejecting the ALJ's conclusion that the applicants have shown by a preponderance of the evidence that they meet the applicable permitting criteria (PETITIONERS' EXCEPTIONS ¶¶ 8 and 9). Petitioners do not claim that the ALJ misapplied the law with regard to these two conclusions of law, and they provide no argument as to how the Applicants failed to meet their burden of proof. Petitioners merely ask us to reject the ALJ's conclusions. The findings of fact underlying those conclusions are supported by substantial competent evidence. As discussed above, we may not reweigh the evidence. Based on the underlying findings of fact, the Governing Board cannot reject the ALJ's conclusions of law. §120.57(1)(l), Florida Statutes. Consequently, Petitioners' exceptions to paragraphs 33 and 35 are denied.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

The exceptions filed by Petitioners are considered timely, even though their pleading was filed with the District Clerk after the filing deadline.

IT IS FURTHER ORDERED THAT

The RECOMMENDED ORDER dated February 14, 2002 and attached hereto is adopted in its entirety. Application number 42-001-71000-1 for a stormwater environmental resource permit is hereby granted under the terms and conditions contained in the District's proposed agency action as set forth in the Technical Staff Report admitted into evidence as District Exhibit No. 2 and attached hereto as Exhibit "B", with "Other Condition" No. 1 of the TSR modified as described in District Exhibit No. 10. Modified "Other Condition" No. 1 shall state: "The proposed surface water management system must be constructed and operated in accordance with the plans received by the District on January 4, 2002."

DONE AND ORDERED this 9th day of April, 2002, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: _____
Duane L. Ottenstroer
CHAIRMAN

RENDERED this 10th day of April, 2002.

BY: Sandra Bertram
SANDRA BERTRAM
DISTRICT CLERK

NOTICE OF RIGHTS

Any party to this order has the right to seek judicial review of the order pursuant to section 120.68, F.S., by the filing of a Notice of Appeal under Rule 9.110 of the Florida Rules of Appellate Procedure with the District Clerk, 4049 Reid Street, Palatka, Florida, 32177, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal and each party to this order. The Notice of Appeal must be filed within 30 days after this order is rendered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 10th day of April, 2002, by U.S. Mail to SAMUEL A. MUTCH, ESQ., Mutch & Brigham, P.A., 2114 NW 40th Terrace, Suite A-1, Gainesville, Florida 32605 and RONALD A. CARPENTER, ESQ., Carpenter & Parrish, P.A., 5608 NW 43rd Street, Gainesville, Florida 32653 and by hand delivery to CHARLES A. LOBDELL, III, and JENNIFER B. SPRINGFIELD, St. Johns River Water Management District, Post Office Box 1429, Palatka FL 32178-1429.

W. H. Congdon

William H. Congdon
Deputy General Counsel