

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSEPH H. BELANGER, PATRICIA)
BELANGER, JEROME STRAUSS,)
and SUSAN STRAUSS,)
)
Petitioners,)
)
vs.) Case No. 02-0116
)
SOUTH FLORIDA WATER)
MANAGEMENT DISTRICT and)
CONQUEST DEVELOPMENTS USA,)
L.C.,)
)
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 May 29,
2002, in Naples, Florida.

APPEARANCES

For Petitioners: Anthony P. Pires, Jr., Esquire
Woodward, Pires & Lombardo, P.A.
3200 Tamiami Trail North, Suite 200
Naples, Florida 34103-4105

Robert E. Murrell, Esquire
Samouce, Murrell & Francoeur, P.A.
800 Laurel Oak Drive, Suite 300
Naples, Florida 34108-2713

For Respondent: Keith W. Rizzardi, Esquire
(Agency) South Florida Water Management District
Post Office Box 24680
West Palm Beach, Florida 33416-4680

For Respondent: Kenneth B. Cuyler, Esquire
(Applicant) Goodlette, Coleman & Johnson, P.A.
4001 Tamiami Trail North, Suite 300
Naples, Florida 34103-3556

STATEMENT OF THE ISSUE

The issue is whether an Environmental Resource Permit should be issued to Conquest Developments USA, L.C., authorizing the modification of an existing stormwater management system serving a residential development known as Silver Lakes in Collier County, Florida.

PRELIMINARY STATEMENT

This matter began on August 15, 2001, when Respondent, South Florida Water Management District, issued its Written Notice of Intended District Decision on Permit Application 010223 authorizing Respondent, Conquest Developments USA, L.C., to modify an existing stormwater management system serving a residential development in Collier County, Florida. On December 13, 2001, Petitioners, Joseph H. Belanger, Patricia Belanger, Jerome Strauss, and Susan Strauss, who live within the development, filed a Petition for Formal Administrative Hearing challenging the issuance of the permit. On December 17, 2001, Petitioners filed an Amended Petition for Formal Administrative Hearing. The matter was referred to the Division of Administrative Hearings on January 9, 2002,

with a request that an Administrative Law Judge be assigned to conduct a hearing.

By Notice of Hearing dated February 25, 2002, a final hearing was scheduled on May 29, 2002, in Naples, Florida. At the final hearing, Petitioners presented the testimony of Gary L. Beardsley, an environmental consultant and accepted as an expert, and Joseph H. Belanger. Also, they offered Petitioners' Exhibits 2, 4-10, and 12-14, which were admitted into evidence. Respondent, South Florida Water Management District, presented the testimony of Karen M. Johnson, an environmental supervisor and accepted as an expert; Cory L. Peck, an environmental scientist and accepted as an expert; and Richard H. Thompson, a senior supervisor engineer and accepted as an expert. Also, it offered District Exhibits A-H, which were received in evidence. The parties also offered Joint Exhibits 1-37, which were received in evidence. Finally, the undersigned took official recognition of certain portions of Chapter 373, Florida Statutes; Chapter 62-340 and Rules 40E-4.054, 40E-4.301, and 40E-4.302, Florida Administrative Code; and the Basis for Review for Environmental Resource Permit Applications Within the South Florida Water Management District.

The Transcript of the hearing (two volumes) was filed on

June 23, 2002. Proposed Findings of Fact and Conclusions of Law were filed by the South Florida Water Management District and Petitioners on July 10 and 15, 2002, respectively, and they have been considered by the undersigned in the preparation of this Recommended Order.

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, South Florida Water Management District (District), proposes to issue an Environmental Resource Permit (ERP) to Respondent, Conquest Developments USA, L.C. (Applicant), authorizing the modification of an existing stormwater management system serving a private, gated residential community known as Silver Lakes RV and Golf Club, Inc. (Silver Lakes) in unincorporated Collier County, Florida. As the agency responsible for the administration of the ERP program, the District has the authority to grant or deny the requested permit. Preliminary action approving the application was taken by the District on August 15, 2001.

2. Silver Lakes is a 146-acre residential development located adjacent to, and on the east side of, County Road 951 approximately 1.5 miles south of the intersection of U.S.

Highway 41 and County Road 951 in southwestern Collier County, Florida.

3. The project site is a part of the larger development and consists of approximately forty undeveloped acres (40-acre site) just north of, and adjacent to, the residential community. If the application is approved, the Applicant would be allowed to construct an open storage facility on a 7.02-acre tract of land in the western part of the 40-acre site on which trailers, boats, motor homes, tow dollies, and similar items will be stored. It would also allow the Applicant to relocate previously permitted lots along the southeastern boundary of the 40-acre site which border the Silver Lakes development.

4. Petitioners, Jerome and Susan Strauss, own Lots 14, 15, and 16 within Silver Lakes. Petitioners, Joseph H. and Patricia Belanger, own Lot 26 within Silver Lakes, which is adjacent to the proposed storage facility. For obvious reasons, the Belangers do not wish to have a storage facility next to their property. Rather, they and the other Petitioners have suggested that the storage facility be reduced in size and moved to a 3.0-acre site in the northeastern portion of the 40-acre site. The parties have stipulated that Petitioners have standing to bring this action.

5. As reflected in the parties' Prehearing Stipulation, Petitioners contend that the proposed construction of the storage area will cause flooding, adverse secondary impacts, and adverse water quantity impacts; that the proposed activity will result in a violation of state water quality standards; that the proposed system will cause adverse impacts to surface water storage and conveyance capabilities, the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters, and the conservation of fish and wildlife; that the Applicant has failed to minimize or avoid impact to jurisdictional wetlands to the greatest extent practicable; that the proposed site provides a wildlife corridor connected to protected lands directly to the west; that the proposed site is jurisdictional wetlands; that the Applicant has engaged in District activities without a permit; and that the proposed site is subject to a Declaration of Covenants, Conditions, and Restrictions. These objections, where relevant, have been grouped into five categories - wetlands, wildlife, secondary and cumulative impacts, water quality and quantity, and prior enforcement activities - and they are addressed separately below.

b. Wetlands

6. The District has adopted and incorporated by reference in Rule 40E-4.091(1)(a), Florida Administrative

Code, a document known as the Basis of Review for Environmental Resource Permit Applications Within the South Florida Water Management District (Basis of Review). The standards and criteria found in the Basis of Review are used to determine whether an applicant has given reasonable assurances that the conditions for issuance of an ERP have been satisfied. Compliance with the criteria in the Basis of Review creates a presumption that the standard and additional conditions for issuance of an ERP in Rules 40E-4.301 and 40E-4.302, Florida Administrative Code, respectively, have been met. See Section 1.3, Basis of Review.

7. Section 4.2.1 of the Basis of Review generally requires that an applicant provide reasonable assurances that wetland impacts be eliminated or reduced to the greatest extent practicable. This can be done through the implementation of "practicable design modifications" to the project, or where adverse impacts still remain after such modifications, through mitigation.

8. There are 36.82 acres of wetlands throughout the 40-acre site. If the application is approved, there will be adverse impacts to 9.9 acres of wetlands in the western portion of the site (where the storage facility will be located) and to 3.37 acres in the southeastern portion of the site.

9. To avoid and minimize wetland impacts, the Applicant has been required to reduce the number of acres impacted from its original proposal, and to place the storage area on the western part of the 40-acre site near County Road 951. In the original application, the Applicant proposed to place the storage area in the eastern part of the site and to create a larger storage area.

10. Although the western part of the 40-acre site contains higher quality wetlands than the central or eastern parts, the western area is not pristine, and it is substantially impacted by exotic species, such as wax myrtle and Brazilian pepper. In addition, the western area is adjacent to County Road 951, which reduces wetland functions and values, reduces habitat values because of increased light and noise encroachment, and increases risk to wildlife because of passing vehicles. Further, the central and eastern areas are adjacent to other undeveloped lands, and this creates the potential for larger tracts of preserved and enhanced wetlands and maximizes wetland functions and values.

11. Impacts to wetlands will be adequately mitigated by the Applicant preserving and enhancing 26.92 acres within the 40-acre site in a recorded conservation easement; by monitoring and reporting on the on-site mitigation (easement) for a five-year period and by maintaining the property in

perpetuity; by purchasing 3.66 mitigation credits of similar wetland habitat from the Panther Island Mitigation Bank; and by adhering to a remediation plan (found in the Special Conditions in the permit) to address any future deficiencies in the mitigation.

12. Given these considerations, it is found that the Applicant has provided reasonable assurances that the wetland impacts from the proposed activities will be eliminated or reduced as required by Section 4.2.1 of the Basis of Review.

c. Impact on Wildlife

13. Section 4.2.2 of the Basis of Review requires an applicant to provide reasonable assurances that the activity will not impact the values of wetlands and other surface water functions so as to cause adverse impacts to the abundance, diversity, or habitat of fish, wildlife, and listed species.

14. The primary agency responsible for the protection of wildlife is the Florida Fish and Wildlife Conservation Commission (Commission), and not the District. Therefore, Section 4.2.2 of the Basis of Review requires that the District provide the Commission with a copy of all ERP applications for its review and comment as to wildlife issues. In this case, the Commission offered no comments or objections regarding wildlife on the property in question.

15. The evidence shows that listed and endangered

species such as Florida panthers, wood storks, and Big Cypress fox squirrels have been spotted on infrequent occasions on the 40-acre site by residents of Silver Lake. However, the parties stipulated that there was no evidence of any nesting, denning, or breeding activity on the same site. Based on the evidence of record, including the Applicant's Protected Species Survey, it is fair to infer that there is limited or no use of the property by protected wildlife species. Indeed, Petitioners' own expert found no evidence of endangered or threatened species on the 40-acre site during his two inspections.

16. Two Special Conditions have been incorporated into the permit to protect endangered, threatened, or other listed species. First, in the event that Big Cypress fox squirrels are observed on or near the property, Special Condition 24 requires that the Applicant prepare a habitat management plan, in consultation with the Commission, to address issues related to nesting habitat. Second, if any endangered or threatened species are ever found on the property, Special Condition 25 requires

that the Applicant coordinate with the Commission or the U.S. Fish and Wildlife Commission for guidance or recommendations.

17. Given the above, the evidence supports a finding that the Applicant has given reasonable assurances that the requirements of Section 4.2.2 of the Basis of Review have been satisfied.

e. Secondary and Cumulative Impacts

18. Section 4.2.7 of the Basis of Review requires that an applicant provide reasonable assurances that the proposed activity will not cause adverse secondary impacts to the water resources. At the same time, Section 4.2.8 requires that an applicant provide reasonable assurances that a regulated activity will not cause unacceptable cumulative impacts to wetlands and other surface waters within the same drainage basin as the regulated activity for which the permit is being sought. In providing the necessary reasonable assurances regarding cumulative impacts, Section 4.2.8.2 authorizes an applicant to use preservation and mitigation measures to prevent cumulative impacts.

19. The more persuasive evidence shows that the project will not cause secondary impacts to wetlands. This is because a water quality berm system surrounds the wetlands, isolating the wetland system from the surface water management system; a 50-foot preserved area lies between the storage area and the

adjacent property boundary to the north; the storage area is being placed in an area already secondarily impacted by County Road 951; and the wetland preservation area will be placed in the conservation easement.

20. Further, the project will not cause secondary impacts to wildlife. This is because structural buffers will prevent future encroachment into the wetlands and distance any wildlife away from the more dense residential functions. These buffers include a 50-foot wide natural preserve on the north side of the storage area (Special Condition 26), an already-erected structural buffer to the south of the storage area (Special Condition 26), and a 17 to 21-foot structural buffer (planted with native vegetation or vegetated buffers) on the eastern side of the 40-acre site where the new lots are proposed. Except for two conclusionary opinion statements by Petitioners' expert, without further facts or explanation, no other evidence on secondary impacts was offered.

21. The project will not cause cumulative impacts to the wetlands. This is because the proposed mitigation for the project adequately offsets the impacts of the 40-acre site, and the impacts from other permitted projects in the basin area have been sufficiently offset. In addition, very little property in the area remains to be developed, and there are no new applications before the District involving the same basin.

In the event a new application may be filed, however, the District will require the applicant to offset any impacts associated with its project with buffers and conservation easements, like the Applicant in the instant case.

f. Water Quantity and Quality

22. Section 5.0 et. seq. of the Basis of Review contains water quality criteria that must be satisfied in order for an ERP to be issued, while Section 6.0 et. seq. addresses water quantity criteria for an ERP. Given the limited nature of changes to the existing system and the lack of a hydrologic connection to the wetlands, and for the following additional reasons, the Applicant has given reasonable assurances that the project complies with the water quality and quantity criteria.

23. The project as designed includes a grass swale near the storage area on the western part of the 40-acre site. The rainfall and run-off from the storage area flows into an internal road, through the grass swale, into a storm drain, and then into the pre-existing water management system associated with the original permit for Silver Lake.

24. The project also allows rainfall and run-off from the proposed lots on the southeastern border of the 40-acre site to sheetflow onto an internal road, where waters are collected in existing catch basins and conveyed into the

previously permitted water management system associated with the original permit.

25. Since the rainfall and run-off from the storage area and lots drain into the existing lakes (Lakes 1 and 2) that are part of the Silver Lakes water management system, those waters will be treated for water quality through wet detention before their eventual discharge to McIlvane Bay, which lies to the southwest of Silver Lake.

26. The basin discharge rates, minimum floor elevations, road designs, parking lot designs, structure control elevations, and structure sizes are specified in the the District's Staff Report, and were set at or above the calculated design limitations to meet water quality and quantity requirements.

27. Section 5.2.1(a)1. of the Basis of Review specifies that wet detention volume shall be provided for the first inch of runoff from the developed project. The evidence shows that the proposed system captures one inch of run-off over the entire site, which drains into the existing lake system to provide water quality treatment.

28. The system is also designed to meet the relevant discharge rate requirements for a 25-year, 3-day storm event, and the minimum floor elevations were based on a 100-year, 3-day storm event.

29. The wetland preserve area is outside the area served by the surface water management system, is not hydrologically connected to that system, and will not be affected by run-off from the storage area or lots.

30. Just prior to the final hearing, the District added Special Condition 23 to create a 50-foot buffer zone along the southern boundary of the storage area for aesthetic purposes and to reduce secondary impacts. Implementation of that buffer must be in accordance with the staff report, will not change the surface water management system, will have no impact on water quality or flood control, and will be implemented after additional consultation with the District.

g. Past Enforcement

31. Rule 40E-4.302(2), Florida Administrative Code, requires that the District take into consideration past violations of various rules adopted by the District. No enforcement action relating to the property has ever been taken by the District against the Applicant for any violation of ERP requirements.

32. Although Petitioners suggested that unpermitted fill activities have taken place on the southeastern part of the 40-acre site, an inspection by District personnel revealed that unpermitted activities were "not significant." Further, Special Condition 23 requires that the Applicant restore "that

portion of the disturbed wetland area located in the southeast corner of the site which is to be included in the wetland preserve area." Therefore, any impacts to the 40-acre site resulting from past unpermitted activities have been considered and remedied.

CONCLUSIONS OF LAW

33. 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.

34. As the applicant in this cause, Conquest Developments USA, L.C., bears the burden of showing by a preponderance of the evidence that it is 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).

35. The issuance of an ERP is governed by Chapter 373, Florida Statutes, Chapters 40E-4 and 40E-400, Florida Administrative Code, and the Basis of Review. In general terms, an applicant must give reasonable assurance that the conditions for the issuance of an ERP have been met. Reasonable assurance 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); City of Newberry v. Watson Construction Co., Inc. et al., 19 F.A.L.R. 2067, 2080 (DEP

1996). However, the reasonable assurance standard does not require an "absolute guarantee" of compliance with environmental standards. Save our Suwannee v. Dep't of Envir. Protection and Piechocki, 18 F.A.L.R. 1467, 1472 (DEP 1996); Manatee-88, Inc. v. Agrico Chemical Co. and Fla. Dep't of Envir. Regulation, 12 F.A.L.R. 1319 (DER 1990); Hoffert v. St. Joe Paper Co. et al., 12 F.A.L.R. 4972 (DER 1990).

36. By a preponderance of the evidence, the Applicant has established that the proposed modifications to the existing system comply with all requirements of Chapter 373, Florida Statutes, the associated rules in Chapters 40E-4 and 40E-400, Florida Administrative Code, and the Basis of Review. Therefore, the Applicant is entitled to the issuance of an ERP.

37. Finally, ongoing litigation in Circuit Court between Petitioners and the Applicant concerning ownership of the 40-acre site, and determinations by the Collier County Planning Commission and Collier County Environmental Advisory Council concerning the need for a 7.02-acre storage facility, are not relevant to this proceeding.

RECOMMENDATION

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

RECOMMENDED that the South Florida Water Management

District enter a final order granting Permit Application No. 010223-5 of Conquest Developments USA, L.C., for an Environmental Resource Permit.

DONE AND ENTERED this 24th day of July, 2002, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
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 24th day of July, 2002.

COPIES FURNISHED:

Henry Dean, Executive Director
South Florida Water Management District
Post Office Box 24680
West Palm Beach, Florida 33416-4680

Anthony P. Pires, Jr., Esquire
Woodward, Pires & Lombardo, P.A.
3200 Tamiami Trail North, Suite 200
Naples, Florida 34103-4105

Robert E. Murrell, Esquire
Samouce, Murrell & Francoeur, P.A.
800 Laurel Oak Drive, Suite 300
Naples, Florida 34108-2713

Keith W. Rizzardi, Esquire
South Florida Water Management District
Post Office Box 24680
West Palm Beach, Florida 33416-4680

Kenneth B. Cuyler, Esquire
Goodlette, Coleman & Johnson, P.A.
4001 Tamiami Trail North, Suite 300
Naples, Florida 34103-3556

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.