

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRIAN DIVENTURA,)
)
 Petitioner,)
)
 vs.) Case No. 03-2838
)
 THE GABLES AT STUART and)
 SOUTH FLORIDA WATER)
 MANAGEMENT DISTRICT,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

On November 29, 2005, a final hearing was conducted in this case in Palm Beach County, Florida, before J. Lawrence Johnston, a duly-appointed Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH), pursuant to Sections 120.569 and 120.57, Florida Statutes (2005).

APPEARANCES

For Petitioner: Brian DiVentura, pro se
377 Northwest Canna Way
Jensen Beach, Florida 34957-3518

For Respondent The Gables at Stuart:

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Broad and Cassel
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For Respondent South Florida Water Management District:

Ashley D. Foster, Esquire
Office of the General Counsel
South Florida Water Management District
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STATEMENT OF THE ISSUE

This case involves a third-party challenge to South Florida Water Management District's (District's) proposed issuance of Amended Environmental Resource Permit number 43-01438-P (ERP) for conceptual approval for a surface water management (SWM) system to serve 80.71 acres of residential development known as The Gables at Stuart and 1.42 acres of the entrance road easement. The issue to be decided by the ALJ is whether The Gables at Stuart (The Gables) provided reasonable assurances that the proposed development will not be harmful to the water resources of the District, and will comply with the water quantity, environmental and water quality criteria of the District's ERP regulations set forth in Part IV of Chapter 373, Florida Statutes, in Florida Administrative Code Chapter 40E-4, and in the Basis of Review for ERP Applications (BOR) (collectively referred to as the ERP criteria).¹

PRELIMINARY STATEMENT

On December 4, 2000, E. Clark Gibson (Gibson) submitted an application for approval of a conceptual plan for a SWM

system to serve 99.25 acres of residential and commercial development, known as Gables at Stuart (Gables). The District submitted Requests for Additional Information ("RAIs") on: January 3, 2001; December 28, 2001; April 9, 2002; June 19, 2002; and April 1, 2003. Gibson submitted responses to the District's RAIs on: November 30, 2001; March 11, 2002; May 21, 2002; March 3, 2003; and May 5, 2003.

On June 30, 2003, the District served its Notice of Intended Agency Action (Staff Report), which recommended conceptual approval, with conditions. On July 10, 2003, the District's Governing Board approved the Staff Report to issue Conceptual ERP Permit No. 43-01438-P, Application No. 001204-6.

On July 21, 2003, the Haney Creek Greenway Group (Greenway Group), Keith Kopp (Kopp), and Brian DiVentura (DiVentura) challenged the intended issuance of the ERP pursuant to Sections 120.569 and 120.57(1), Florida Statutes, and Rule 40E-1.521. On August 1, 2003, the District transmitted their Request for Administrative Hearing (Petition) to DOAH for assignment of an ALJ.

The case was initially set for final hearing in West Palm Beach on October 22-23, 2003, but Gibson moved to dismiss the Greenway Group and Kopp for lack of standing, and the parties moved for a continuance.

The Order on Motion to Dismiss entered on October 17, 2003, dismissed the Greenway Group with prejudice, dropped it as a party, and dismissed Kopp with leave to amend to allege facts to establish his standing. The final hearing was continued until November 19-20, 2003, and an Amended Petition was filed on October 27, 2003.

On November 5, 2003, all parties but Gibson moved for another continuance. On November 7, 2003, Gibson filed a Motion to Strike and Motion in Limine. On November 12, 2003, the final hearing was continued again, until January 7-8, 2004. The Order Partially Granting Motions to Strike and In Limine, entered on November 26, 2003, struck allegations that Gibson's project site should be made part of a proposed greenway, unless inclusion of the site in the proposed greenway is part of the overall objectives of the District.

On December 29, 2003, the parties requested another continuance, and the final hearing was continued again, until March 2-3, 2004.

On February 17, 2004, Gibson filed an unopposed motion requesting that the case be held in abeyance because of application modifications required to address permitting issues with local governments. The case was placed in abeyance on February 18, 2004, and remained in abeyance for over a year and a half. While the case was in abeyance, the

District submitted an RAI on the modified application on March 11, 2004, and Gibson submitted a response to the RAI on October 13, 2004. Gibson also filed an amended application on that date, which reflected The Gables' purchase of the property from Gibson. The Gables' Motion for Substitution of Parties to reflect the new applicant was granted on December 14, 2004.

While the case remained in abeyance, the District also submitted RAIs to the modified site plans on November 12, 2004, and March 2, 2005. The Gables submitted responses to the RAIs on: January 31, 2005; May 3, 2005; May 5, 2005; May 6, 2005; and June 1, 2005. The Gables also further amended its application on on January 31, 2005.

The District executed and filed with DOAH an Amended Staff Report on September 8, 2005, authorizing conceptual plan approval with conditions for a SWM system to serve 80.71 acres of residential development, known as Gables at Stuart and 1.42 acres of the entrance road easement, for a total permitted area of 82.13 acres. The revisions in the Amended Staff Report include elimination of the commercial tract along Jensen Beach Boulevard, modification to the location of storm water lakes (which decreased wetland impacts), and modification of the mitigation plan to acknowledge the potential, future location of the Green River Parkway on the

Gables property. The Gables also raised the elevation of the berm along the western boundary of the multi-family residential area and east of Wetland 7C to elevation 17.8 feet to match the peak permitted stage within the adjacent Pineapple Plantation development.²

The case was rescheduled for a final hearing on November 29-30, 2005.

On October 21, 2005, Kopp and DiVentura moved for a continuance over objection. Keith Kopp voluntarily dismissed his Amended Petition on November 1, 2005, and was dropped as a party. DiVentura's motion for continuance was denied.

The parties' Joint Prehearing Stipulation was filed November 21, 2005. At the outset of the final hearing conducted on November 29, 2005, the District's Motion to Take Judicial Notice, also filed November 21, 2005, was granted, and the attached, pertinent statutes and rules were officially recognized. Joint Exhibits 1 through 6 were received in evidence. (Joint Exhibit 1 is a composite exhibit consisting of the entire permitting file.) The Gables called: Thomas McGowan as an expert witness in engineering, site development and water management systems; and James Hudgens as an expert witness in biology, ecology, environmental resource permitting, and wetlands analysis and impact. The District called: Anthony Waterhouse as an expert witness in surface

water management engineering and interpreting the District's ERP and BOR criteria; and John Meyer as an expert witness in interpreting and applying the District's ERP and BOR criteria, wetland ecology, wetland biology, wetland delineation, and wetland mitigation. DiVentura presented his case through cross-examination and his own testimony. He called no other witnesses. Rulings on relevance objections to Petitioner's Exhibits 10 and 12 were reserved; at this time, those objections are sustained. Petitioner's Exhibit 20 was received, limited to pages 2 and 25.

After presentation of the evidence, the District ordered a transcript of the hearing, and the parties stipulated to 40 days from the filing of the transcript for the filing of proposed recommended orders (PROs). The Transcript (in two volumes) was filed on January 4, 2006, making PROs due on February 13, 2006. The Gables and the District timely filed PROs, but the Petitioner did not file a PRO.

FINDINGS OF FACT

A. The Parties and Proposed Project

1. The Gables project site is located within the jurisdictional boundaries of the District in Martin County, Section 20, Township 37 South, Range 41 E, bordered to the north by Jensen Beach Boulevard and a 18.64-acre tract of commercial property that was previously included in the

proposed project. To the west and partially to the south is the Pineapple Plantation residential development, and to the east is the Pinecrest Lakes residential development.

2. The Petitioner resides in the Pineapple Plantation development which borders the Gables site.

3. The Gables project site contains 29.54 acres of wetlands; 26.86 of these will be preserved onsite. Additionally, the project will include a conservation easement encompassing 32.7 acres which covers both wetlands and uplands. Development on the site will cover only 28.04 acres; the remaining acreage which is not under a conservation easement will nonetheless be preserved. Wetlands 1, 2, 3, and 4, which are the larger, higher quality wetlands on the site, will be entirely preserved, except for a 0.11 acre area in the southeast corner of wetland 1, where a berm will be constructed. All direct wetland impacts will result from construction of the multi-family housing and its access road on the northern portion of the site. These wetlands are in a more degraded condition than are the wetlands to the south, which are being preserved.

4. The site includes the alignment of the proposed "Green River Parkway" for which Martin County has submitted a permit application. Although this area and the area to the east of it will be preserved by the Gables, no mitigation

credit is given by the District. In fact, portions of wetlands 5 and 6 that are east of the proposed alignment have been considered by the District as secondarily impacted due to the fragmentation and size reduction expected to result from construction of the Parkway even though they are not impacted by the Gables project itself.

5. The site is characterized by pine flatwoods and wet prairies typical of those found along the upper edges of the Savannas in Martin and St. Lucie Counties. The Gables project site is undeveloped but has been hydrologically altered in some areas by offsite conditions. In particular, a large ditch on the west side of the Pinecrest Lakes property adjacent to the eastern boundary of the subject property presently exerts adverse hydrologic affects, as does the entire Pinecrest Lakes development.

6. There is an existing culvert outfall across Jensen Beach Boulevard in the northwest corner of the 18.64-acre commercial property to the north. Runoff from a portion of Jensen Beach Boulevard and undeveloped portions of the West Jensen project are conveyed into the commercial property by this culvert. This runoff then flows easterly and south within the commercial property and, ultimately, under an existing unpaved road used to access two Martin County Utility potable wells located in the eastern project area. The

previously referenced north-to-south ditch located along the western edge of the adjacent Pinecrest Lakes project directs this flow southerly into the Pinecrest Lakes Phase I SWM system. A ridge traversing the northern portion of the Gables project site from west to east prevents appreciable volumes of this off-site discharge from reaching wetlands south of this ridge.

7. In general, wetlands found over the southwestern one-half of the Gables project site are in very good condition, displaying healthy and appropriate vegetation and water levels. The northeast one-half was observed to have significantly less standing water when inspected, and vegetation appeared to be transitioning to less water-tolerant species such as slash pines.

8. The southern portion of the Gables project site consists largely of wetlands. Wetlands designated as Wetlands 4 and 7B extend off-site westerly into the neighboring Pineapple Plantation development.

9. The northernmost 18.64 acre commercial portion of the July 2003 Gables project site has been removed. The commercial portion will require a separate permit prior to any development on that parcel.

10. The Gables has proposed an exfiltration trench to provide runoff from its multi-family section, which is on the

northern portion of the site, with dry pre-treatment equal to one-half inch over the area prior to discharge into the master SWM system. An exfiltration trench consists of buried perforated piping surrounded by gravel which allows runoff to be filtered and treated before exiting the system.

11. The southernmost area of the Gables development is to consist of single-family residential development located in an upland peninsula in the central western portion of the overall Gables project site. This area will be surrounded by a retaining wall. Runoff from the lots and the access road within the single-family area will be directed to the wet detention lakes of the master SWM system.

12. The master SWM system water quality and storm attenuation facilities include 2.415 acres of wet detention pond to be located in the central eastern project site area, as well as dry detention areas, swales and the exfiltration trench located within the project. Discharge from the master SWM system is into the adjacent Pinecrest Lakes development within a previously established drainage easement.

13. The revised conceptual design for the Gables project site continues to re-route the existing historical off-site discharge from West Jensen and Jensen Beach Boulevard southward to the on-site wetlands through a dedicated culvert conveyance that will commence at the northern boundary of the

revised Gables project site area. Conveyance through the formerly included commercial tract will be through existing wetlands. The master SWM system conceptual design will continue to utilize a cascading wetland system, cascading from west to east in accordance with the natural hydrology of the site, with final connection into the master SWM wet detention pond.

14. As the Gables application is for a conceptual permit only, final construction details are not required to be presented at this time, and modifications are to be expected when the applicant files an application for a construction permit.

B. Conditions For Issuance

15. In order to obtain an ERP, an applicant must satisfy the conditions for issuance set forth in Rules 40E-4.301 and 40E-4.302. The Conditions for Issuance primarily focus on: a) water quantity, b) wetland environmental values, and c) water quality.

(i) Water Quantity

16. Under Rule 40D-4.301(1), an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system:

- (a) will not cause adverse water quantity impacts to receiving waters and adjacent lands;
- (b) will not cause adverse flooding to on-site or off-site property
- (c) will not cause adverse impacts to existing surface water storage and conveyance capabilities.

17. The Applicant has demonstrated through hydrological analysis, which takes into consideration the systems on the surrounding properties, the hydrologic inflow from the north, from the West Jensen project, that the proposed project will not cause flooding to on-site or off-site property.

18. Petitioner alleged that the proposal to install a berm around wetland 7 on the Gables property would cause flooding into Pineapple Plantation. But the evidence was that Pineapple Plantation's SWM system, as permitted, was intended to contain the runoff within the boundaries of Pineapple Plantation's property, including the small portion of wetland 7 that straddles the property line between Pineapple Plantation and The Gables. To accomplish this, permission was obtained from Mr. Gibson to install a berm on his property. However, the berm was never installed. The Gables now proposes to install the berm that was supposed to have been there since Pineapple Plantation was permitted. The proposed berm would be established at an elevation sufficient to control runoff produced by a 25-year rainfall event and maintain the previously-established hydrologic divide. For

these reasons, installation of the proposed berm, which is necessary to make The Gables' proposed SWM system function properly, will not cause adverse flooding to the Pineapple Plantation.

19. For various other reasons, Petitioner also alleged that The Gables project will lower wetland water levels in Pineapple Plantation, as well as on the Gables property, having adverse impacts on the quality of those wetlands. Petitioner did not present any expert opinion to support his allegations. Instead, he primarily pointed out what he termed "anomalies" in the permit file during cross-examination of expert witnesses for The Gables and the District. In most instances, the expert witnesses explained that Petitioner was mistaken. In every instance where Petitioner had detected an actual "anomaly," the experts explained that they were insignificant for purposes of the permitting criteria.

20. The Gables provided reasonable assurances that it will not cause adverse impacts to existing surface water storage and conveyance capabilities through the determination of appropriate wetland control elevations which are based on wet season water levels.

21. Petitioner raised a question regarding aquifer recharge, which is a consideration under Section 6.10(e) of the BOR, which requires the project to be designed to

"preserve site ground water recharge characteristics." The project is designed so that water tables are preserved or even raised. It is also designed to preserve the significant wetland features of the site. There are large areas of contiguous areas of wetland and upland habitat which can function as groundwater recharge. The exfiltration trenches make runoff also available to the aquifer for storage. The lakes are not lined, so the water in the lake can leak out. Based on volumetric calculations, the site will have more water post-development than predevelopment. The types of regional investigations of aquifer recharge capabilities and impacts cited by Petitioner were relevant to consideration of groundwater withdrawal issues, not surface water management design.

22. In conclusion, The Gables provided reasonable assurances that it would comply with the District rules pertaining to water quantity and flood control pursuant to Rule 40E-4.301(1)(a),(b), and (c) and the BOR.

(ii) Value Of Functions Of Wetlands

23. Rule 40E-4.301(1)(d) requires an applicant to provide reasonable assurances to demonstrate that its proposed project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters.

24. The wetlands generally located on the north side of the Gables project site are in a more degraded condition than the wetlands to the south. Wetlands generally located over the southerly extent of the site are adequately hydrated and possess high-quality vegetation associations consisting of St. John's wort, maidencane, yellow-eyed grass, and beak rush. This habitat lends itself to utilization by a variety of wading birds, raptors, snakes, and small mammals such as raccoons, bobcats, armadillos, opossums, and feral pigs. In contrast, Wetlands 5, 6, and 7 on the north side exhibit slight-to-significant hydrologic and vegetation changes due to the adjacent Jensen Beach Boulevard and Pinecrest Lakes development to the north and east, respectively.

25. The Gables is proposing both wetland and upland preservation. A mosaic of uplands and wetlands together enhances the value of both and provides a good habitat for wildlife. Mixing upland preservation mixture with wetland preservation increases the value of the wetlands because uplands support wetland habitat, and the "ecotone" at the edge of the upland and wetlands provides the most valuable part of the habitat. The value of preserving this area outweighs potential preservation of the less valuable wetlands to the north, which will be impacted by the multi-family portion of the project.

26. The Gables has provided reasonable assurances to demonstrate that the value of functions provided by wetlands and other surface waters will not be adversely affected.

(iii) Water Quality

27. Rule 40E-4.301(1)(e) requires an applicant to provide reasonable assurances that the proposed project will not adversely affect the quality of receiving waters such that state water quality standards will not be violated.

28. Section 5.2.1 of the BOR requires that retention, detention, or both retention and detention be provided in the overall system in one of the following three ways or equivalent combinations thereof:

1. Wet detention volume shall be provided for the first inch of runoff from the developed project, or the total runoff of 2.5 inches times the percentage of imperviousness, whichever is greater.
2. Dry detention volume shall be provided equal to 75 percent of the above amounts computed for wet detention.
3. Retention volume shall be provided equal to 50 percent of the above amounts computed for wet detention. Retention volume included in flood protection calculations requires a guarantee of long term operation and maintenance of system bleed-down ability.

29. The Gables has proposed an exfiltration trench system for the multi-family parcel and a lake system to handle runoff from the overflow and from the single-family portion of the project. With these facilities in place, runoff from the

proposed development will be treated before any stormwater is discharged off site. Calculations were performed to ensure that the project is engineered to meet these criteria.

30. Petitioner suggested that the project may require more exfiltration trench than in the current plans, due to compaction of the soil from construction activities, which may affect permeability. However, Petitioner presented no evidence to support this suggestion. The expert witness for the Gables explained that compaction usually affects the top two feet of the soil profile, whereas the exfiltration trenches are designed to be 4-5 feet below the ground surface and probably will function as expected. In any event, when a construction permit is sought, final testing will be performed and additional trench will be installed if necessary. The project will accommodate double the amount of exfiltration trenching in the conceptual plan.

31. The Gables has provided reasonable assurances to demonstrate that the project will not adversely affect the quality of receiving waters such that State water quality standards will not be violated.

(iv) Reduction And Elimination

32. Section 4.2.1 BOR requires that practicable design modifications be explored to reduce or eliminate adverse

impacts to wetlands and maximize functions provided by wetlands on the project site.

33. The applicant explored all practicable alternatives in order to reduce or eliminate wetlands impact.

34. In 2000, the Applicant proposed approximately 7.5 acres of wetland impact. In 2001, the Applicant submitted a plan to the District that preserved part of Wetland 5 and impacted the remainder of Wetland 5 by dredging a lake. The current application proposes preserving more of Wetland 5 and three smaller lakes, rather than a single lake, which has the effect of further decreasing wetland impacts

35. The site plan was also modified to address flowage from north of Jensen Beach Boulevard to the south, thereby reducing secondary impacts to all the wetlands that are now being preserved. In addition, a retaining wall has been added around much of the development to offset secondary impacts, and additional buffers have been put in place. Finally, as noted above, the preservation of a large tract of mixed upland and wetlands is more beneficial than preservation of a small amount of degraded wetlands.

36. Conceivably, wetland impacts could be further reduced or eliminated by further decreasing the amount of development. But given the present layout of the proposed site plan, a further reduction would not be considered

practicable. Therefore, The Gables has adequately applied the reduction and elimination criteria as required by the BOR and the District's regulations.

(v) Secondary Impacts

37. Secondary impacts are indirect impacts that are reasonably expected to occur as a result of development. Rule 40E-4.301(1)(f) and Section 4.1.1(f) of the BOR require an applicant to provide reasonable assurances that the proposed activities will not cause adverse secondary impacts to the water resources.

38. The District conducted a secondary impact analysis and assessed secondary impacts to wetlands 5, 6, and 7. A small portion of wetland 1, which extends off-site, was also assessed as a secondary impact because approximately half an acre of it is cut off by a proposed berm.

39. Pursuant to Subsection 4.2.7(a) of the BOR, a 25-foot buffer is required around a wetland to prevent secondary impacts. Except for the small portion of wetland 1 discussed above, wetlands 1, 2, 3, and 4 will not be secondarily impacted because each wetland has at least a 25-foot buffer and, in some cases, a retaining wall.

(vi) Mitigation

40. An applicant is required to mitigate for secondary impacts as well as for direct wetlands impacts.³ The Gables

is providing a conservation easement in favor of the District to include 18.26 acres of high-quality uplands and 20.8 acres of high-quality wetlands, though mitigation credit is being allowed by the District for only 5.79 acres of the upland portion. The value and importance of a conservation easement is that it provides reasonable assurances that a resource will not be developed in the future. Inclusion of uplands in a conservation easement is particularly valuable because development of uplands ordinarily would be more likely, and because combining wetlands and uplands in a conservation easement has the effect of enhancing the value of the wetlands by encouraging their use by wildlife.

41. Under Section 373.414, Florida Statutes, the Uniform Mitigation Assessment Method (UMAM), which is implemented through Rule Chapter 62-345, wetland impacts from the proposed project will result in 2.63 units of functional loss, while proposed mitigation will provide 2.87 units of functional gain. This UMAM analysis demonstrates that the proposed mitigation offsets wetland impacts.

42. Petitioner questioned whether The Gables and the District properly applied Rule 62-345.600(3)(c) in determining the amount of required mitigation. Specifically, Petitioner contended that, since The Gables is not using a mitigation bank or a regional offsite mitigation area as mitigation, the

acreage of mitigation required to offset wetland impacts was to be calculated by dividing functional loss (FL) by relative functional gain (RFG). However, Petitioner did not explain what the result would be if this calculation were made. Meanwhile, the expert witnesses for both the District and The Gables interpreted the language of the Rule to provide that one divides FL by RFG to determine acres of mitigation required only when one discrete area is being impacted and another discrete area is serving as mitigation, which is not the case here. According to the experts, the second sentence of subparagraph (3)(c) explains that, when there is more than one impact or mitigation assessment area, total functional loss and total RFG for each assessment area is determined by summation of the FL and RFG for each assessment area. While the language of the Rule is confusing, the expert testimony is credited and accepted as providing a logical and correct interpretation.

43. The BOR specifically provides in Section 4.3.1.2 that mitigation is best accomplished on-site or in close proximity to the area being impacted. In this case, all of the mitigation proposed is onsite.⁴

44. Section 4.2.2 of the BOR provides that as part of the District's assessment of impacts of regulated activities upon fish and wildlife and their habitats, the District will

provide notice of ERP applications to the Florida Game and Freshwater Fish Commission (now the Fish and Wildlife Commission, or FWC) for its review and comment. The FWC did not comment on the Gables at Stuart application.

45. The U.S. Fish and Wildlife Service wrote a letter to the U.S. Army Corps of Engineers in 2003, stating that it did not object to the applicant's wetland impacts and proposed mitigation plan for the proposed project.

46. The Gables provided reasonable assurances that mitigation will offset all impacts to wetlands.

C. Petitioner's Extrapolation from Well Permitting Concerns

47. Petitioner's testimony at final hearing revealed his challenge was motivated by his belief that, because the District has denied applications for permits to withdraw substantial amounts of groundwater in the region, in part due to potential impacts on surficial aquifer and wetlands, it does not make sense to allow any impacts to wetlands in SWM permitting. However, SWM permitting is governed by the criteria discussed above, not the criteria of consumptive use permitting. In addition, the potential impacts of massive consumptive use of groundwater cannot be compared to wetland impacts of the Gables proposal. Finally, as indicated, The Gables has established water table elevations for resulting wetland systems based on the existing condition of those

wetlands. In some places, The Gables has proposed to raise water levels to benefit the wetlands and raise the water table above what it has been historically, primarily along the eastern boundary of the property in the Pinecrest Lakes subdivision. This has the effect of maintaining if not raising groundwater levels.

CONCLUSIONS OF LAW

48. This is a de novo proceeding designed to formulate final agency action. See Hamilton County Board of County Commissioners v. State Department of Environmental Regulation, 587 So. 2d 1378, 1387-1388 (Fla. 1st DCA 1991); Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 786-787 (Fla. 1st DCA 1981); § 120.57(1)(k), Fla. Stat.

D. ERP Criteria

49. Issuance of an ERP must be based solely on compliance with applicable permit criteria. See Council of the Lower Keys v. Charley Toppino & Sons, Inc., 429 So. 2d 67 (Fla. 3d DCA 1983). Reasonable assurance contemplates a substantial likelihood that the project will be successfully implemented. See Metropolitan Dade County v. Coscan Florida Inc., 609 So. 2d 644 (Fla. 3d DCA 1992). Absolute guarantees are not necessary, and a permit applicant is not required to eliminate all contrary possibilities or address impacts that

are only theoretical and cannot be measured in real life. See City of Sunrise v. Indian Trace Community Development District, et al., DOAH Case No. 91-6036, 1991 Fla. ENV LEXIS 6997, 92 ER FALR 21 (DOAH 1991, SFWMD 1992); Manasota-88 Inc. v. Agrico Chemical Co. and Department of Environmental Regulation, DOAH Case No. 87-2433, 1990 Fla. ENV LEXIS 38 (DER 1990). Furthermore, as the instant application is for a conceptual permit, the applicant does not need to provide detailed construction plans and may make modifications as such plans are developed.

50. The applicable criteria for the issuance of a standard general ERP for the project are set forth in Rules 40E-4.301 and 40E-4.302, as well as SFWMD's BOR, which is made applicable pursuant to Rule 40E-4.301(3).

51. Notwithstanding Petitioner's contention to the contrary, it was found and is concluded that the UMAM analysis done by The Gables and the District was proper under Rule 62-345.600(3)(c).

E. Burdens of Proof and Persuasion

52. As applicant, The Gables has the ultimate burden of proof and burden of persuasion. See Florida Department of Transportation v. J.W.C. Company, Inc., supra at 786-789. Upon presentation of a prima facie case of credible evidence of reasonable assurances and entitlement to the permit, the

burden of presenting evidence can be shifted to Petitioner, as permit challenger, to present evidence of equivalent quality to refute the applicant's evidence of reasonable assurances and entitlement to the permit. Id.; Ward v. Okaloosa County, DOAH Case No. 88-5147, 1989 Fla. ENV LEXIS 105, 89 ER FALR 83 (DER 1989).

53. Upon agreement of the parties, SFWMD's file containing the permit application, all supporting information and documents, and the agency's analysis and decision concerning issuance of the permit, was submitted as Joint Exhibit 1.

54. Joint Exhibit 1 established a prima facie case of reasonable assurances and entitlement to the permit. Additionally, the expert opinions presented by witnesses for The Gables and for the District supported the application and the conclusion of the Amended Staff Report that reasonable assurances were provided that the Rules and BOR criteria were met, notwithstanding Petitioner's cross-examination.

55. Based on that evidence, as permit challenger, Petitioner had the burden of producing evidence of equivalent quality to refute the Gables prima facie case. Petitioner's burden cannot be met by mere speculation on what might occur. Citizens Against Blasting Inc., v. Department of Environmental Protection and Angelo's Aggregate Materials Ltd., DOAH Case

No. 00-4007, 2001 Fla. ENV LEXIS 31, 1 ER FALR 94 (DEP 2001); Chipola Basin Protective Group Inc., et al. v. Department of Environmental Regulation, 11 F.A.L.R. 467, 480-481, 1988 WL 185574, at *3-7 (DER 1988).

56. In this case, Petitioner presented no substantive evidence, and The Gables proved its entitlement to the permit by a preponderance of the evidence. See Fireman's Fund Indemnity Co. v. Perry, 5 So. 2d 862 (Fla. 1942).

57. On the other hand, the burden to prove standing is on Petitioner. Since Petitioner failed to prove his allegations of flooding or any other adverse impacts to his environmental interests due to the design of the SWM system, he failed to prove his standing. See § 120.52(12)(b), Fla. Stat. (2005)(party standing can be given to a "person . . . whose substantial interests will be affected by proposed agency action); § 403.412(5), Fla. Stat. (2005)("substantial interests . . . will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter"). See also Agrico Chem. Co. v. Dept. of Environmental Reg., 406 So. 2d 478 (Fla. 2d DCA 1981), rev. den., 415 So. 2d 1359 (Fla. 1982).

RECOMMENDATION

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

RECOMMENDED that the South Florida Water Management District enter a final order issuing to The Gables ERP number 43-01438-P, to expire in two years, subject to the conditions set forth in the Amended Staff Report.

DONE AND ENTERED this 16th day of March, 2006, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of March, 2006.

ENDNOTES

1/ Unless otherwise noted, all statutory citations are to the 2005 codification of the Florida Statutes, and all rule citations are to the current version of the Florida Administrative Code.

2/ The Amended Staff Report erroneously mentions offsite mitigation, which actually is not proposed, and erroneously states that the ERP will expire in July 2005. Actually, as a conceptual permit, the ERP would expire two years after entry

of the final order in this case. See Fla. Admin. Code R. 40E-4.321(1)(a).

3/ Although cumulative impacts within the applicable drainage basin also are required to be considered under Section 373.414(8), Florida Statutes, the parties stipulated that cumulative impacts are not an issue in this case.

4/ Since all mitigation is onsite, it also is all within the same drainage basin where the wetland impacts occur; since mitigation fully offsets the impacts under the UMAM analysis, there can be no cumulative impacts.

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South Florida Water Management District
3301 Gun Club Road, MSC 1410
West Palm Beach, Florida 33406-3007

Brian DiVentura
377 Northwest Canna Way
Jensen Beach, Florida 34957-3518

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.