

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STEVE LARDAS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 05-0458
)	
DEPARTMENT OF ENVIRONMENTAL)	
PROTECTION,)	
)	
Respondent.)	
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RECOMMENDED ORDER

On May 17-19, 2005, a final administrative hearing was held in this case in Bradenton, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Kevin S. Hennessy, Esquire
Maggie D. Mooney, Esquire
Lewis, Longman & Walker, P.A.
1001 Third Avenue West, Suite 670
Bradenton, Florida 34205-7863

For Respondent: Nona R. Schaffner, Esquire
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner, Steve Lardas, is entitled to a mosquito ditch exemption, under

Florida Administrative Code Rule 40D-4.051(10)¹, from the wetlands jurisdiction and environmental resource permitting requirements of the Department of Environmental Protection (DEP) for Lots 4, 5, 6, 14, 15, 18, and a vacated alley of Block 44, Ilexhurst Subdivision, Holmes Beach, Manatee County.

PRELIMINARY STATEMENT

On November 15, 2004, DEP gave notice of its intent to deny Petitioner's request for exemption, DEP File No. 41-0231220-001. Petitioner timely requested an administrative proceeding. On February 8, 2005, the matter was referred to DOAH, where it was given DOAH Case No. 05-0458, assigned to the undersigned ALJ, and scheduled for a final hearing in Bradenton.

At the final hearing, Petitioner testified and called eight witnesses: Sophia Lardas; George Molinaro, an environmental consultant for Petitioner; Sam Johnston, Jr., an environmental consultant on another project; Russell Hyatt, P.S.M., an expert in surveying and mapping; Mark Latham, Director of the Manatee County Mosquito Control District; Alec Hoffner, an expert in soil science; Donald J. Lee, P.G., an expert in coastal sedimentology; and Brian Ormiston, Ph.D. in Ecology, and an expert in wetlands ecology and interpretation of surveys and aerial photography. Petitioner also had Petitioner's Exhibits 2, 4(A-D), 5, 9, 10, 12, 13A, 14A, 15(A-

B), 16, 18, 20, 21, 24, 24A, 29, 30, 31, 33, 34, 34A, 35, 35A, and 39 admitted in evidence. (Objections to Petitioner's Exhibits 17 and 19 were sustained.) Ruling was reserved on objections to Petitioner's Exhibit 38, the deposition of Larry Rhodes, retired former Director of the Manatee County Mosquito Control District. Those objections are now overruled, and the exhibit is admitted in evidence.

At the final hearing, DEP called the following employees as witnesses: Richard Malloy, as an expert surveying and mapping; Terry Cartwright, who processed and reviewed Petitioner's exemption application; William Kelsey, P.G., as an expert in geology; Richard Cantrell, Deputy Division Director, Water Resources Management, as an expert in jurisdictional wetlands delineation, aquatic ecology, and the interpretation of aerial photography; Eric Hickman, Administrator, Jurisdictional Wetlands Delineations, as an expert on that subject, as well as interpretation of aerial photography; and Maynard Sweeley, Soil Scientist, as an expert on hydric soil identification. DEP had Respondent's Exhibits 6, 6A-6C, 7, 10, 11, 16(A-B), and 22 admitted in evidence.

After presentation of evidence, the parties requested a Transcript of the final hearing and 30 days from the filing of the Transcript in which to file proposed recommended orders (PROs). The Transcript (in six volumes) was filed on June 29,

2005, and the parties filed timely PROs on July 29, 2005. Without objection, DEP filed an amended PRO on August 1, 2005, which has been considered, along with Petitioner's PRO.

In view of this Recommended Order, Petitioner's request in his PRO for attorney's fees and costs under Sections 120.595(1) and 57.111, Florida Statutes (2004), is denied.

FINDINGS OF FACT

1. In 1950, Petitioner's great-grandfather acquired title to Lots 4, 5, 6, 14, 15, 18, and a vacated alley of Block 44, as well as 38 other lots in the Ilexhurst Subdivision, Holmes Beach, Manatee County. In 1991, title to 28 of the lots, including Lots 4, 5, 6, 14, 15, 18, and the vacated alley of Block 44 (the Property at issue), was transferred to Petitioner and his two brothers from their grandmother.

2. Sometime in the mid-1950's, the Manatee County Mosquito Control District dug a network of mosquito control ditches from Sarasota Bay to the east of Anna Maria Island towards the beaches on the west.

3. The purpose of the ditching at that time was to hydrate high marsh areas favored for breeding by the black salt marsh mosquito (*Aedes batis*). That species of mosquito, which bites aggressively and painfully and flies great distances, must lay its eggs on damp ground and cannot lay

them in standing water; the eggs then hatch when heavy rains or extraordinarily high tides flood the breeding ground. The object of the ditching is to hydrate the breeding grounds more continuously during normal rain and tide conditions so that the mosquitoes no longer can breed there.

4. A finger of the network of ditches dug in the 1950's bisected the Property at issue approximately diagonally from the northeast corner to the southwest corner, terminating at the right-of-way of Avenue C. (There also were branches off the finger that terminated in property to the north and south.) In the early 1960's, the ditches were cleaned and widened to correct the effect of alterations to them during road construction.

5. Because the ditches were connected to Sarasota Bay, they not only hydrated previously drier areas with salty water, they sped the introduction of mangroves (red, black, and white), whose seedlings float and can be pushed inland by tide and wind. How far inland seedlings float depends on their size. As a result, mangroves propagated themselves via the ditches in the ditches and along the banks of the ditches. It is now clear that, except for a narrow strip in the northwestern part of the Property and a small part of the extreme southwestern corner of the Property where fill placed on the adjacent parcels extended onto Petitioner's Property,

Petitioner's entire parcel consists of jurisdictional wetlands containing red, black, and white mangroves and other wetlands vegetation.

6. It is Petitioner's position on the ultimate disputed issues of material fact: that his Property contained no wetlands prior to the mosquito control ditches being dug; that the ditch was dug through uplands on his Property solely to reach property to the south which contained a pocket of targeted mosquito-breeding ground; and that his Property still would be uplands were it not for the digging of the mosquito control ditches.

7. In support of his position, Petitioner presented extensive and detailed testimony and evidence in an attempt to prove his position. But some of Petitioner's evidence (e.g., the affidavits of Steve G. Lacios and Lawrence M. Rhodes included in DEP Exhibit 1, the application file) was not competent (i.e., hearsay not admissible over objection in a civil action and therefore insufficient to support a finding of fact by itself). Other evidence presented by Petitioner was not persuasive. (E.g., Petitioner's mother testified to the condition of "the property" when her grandfather showed it to her in the 1950's, but at the time her grandfather owned 42 lots, and the Property in question was situated two vacant lot-lengths (200 feet) and a vacant 50-foot road right-of-way

east of the nearest existing road (Gulf Drive), making it questionable whether the precise Property in question actually was viewed by her. In addition, Petitioner's mother also testified that neither her father nor her grandfather ever knew there was a mosquito ditch on the Property in question even though they supposedly walked it at least once a year.) Other evidence proved some subordinate facts (e.g., that a hurricane prior to 1940 may have "over-washed" the beach dunes and deposited a "wash-over fan" of beach sand and shells on Petitioner's property, and that there were few if any mangroves on Petitioner's Property prior to mosquito control ditching). But those subordinate facts were not determinative of the ultimate disputed issues of material fact--i.e., they did not disprove the existence of any kind of jurisdictional wetlands on the Property before and after the wash-over event and before the mosquito control ditching.

8. Meanwhile, DEP countered with its own extensive and detailed testimony and evidence, which was persuasive. It is found that the evidence, taken as a whole, did not prove Petitioner's position. To the contrary, taken as a whole, the evidence proved DEP's position--namely, that Petitioner's Property did not consist entirely of uplands prior to the mosquito control ditching; that Petitioner's Property consisted of wetlands prior to the mosquito control ditching;

and that the mosquito control ditches were dug to reach mosquito-breeding wetlands on the Property as well as on property to the south.

9. Proposed findings of fact 18-20 and 22-51 in DEP's PRO include a clear and comprehensive explanation why DEP's evidence was more persuasive on the ultimate disputed issues of material fact. These proposed findings of fact are approved and adopted except for a few scrivener's errors.²

CONCLUSIONS OF LAW

10. This is a de novo proceeding. See § 120.57(k), Fla. Stat. (2004). This means that perceived shortcomings in DEP's review and evaluation of Petitioner's mosquito control ditch exemption application are not relevant on the issue of whether the application should be granted, which must be determined on the evidence presented during the final hearing. See McDonald v. Department of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977); Calvin C. Miles v. Florida A and M University, 813 So. 2d 242, 247 (Fla. 1st DCA 2002).

11. Section 373.4211(25), Florida Statutes (2004), provides:

The first sentence of rule 17-340.750, Florida Administrative Code, is changed to read:

"17-340.750 Exemption for Surface Waters or Wetlands Created by Mosquito Control Activities.
"Construction, alteration, operation, maintenance, removal,

and abandonment of stormwater management systems, dams, impoundments, reservoirs, appurtenant works, or works, in, on, or over lands that have become surface waters or wetlands solely because of mosquito control activities undertaken as part of a governmental mosquito control program, and which lands were neither surface waters nor wetlands before such activities, shall be exempt from the rules adopted by the department and water management districts to implement subsections 373.414(1) through 373.414(6), 373.414(8), and 373.414(10), F.S.; and subsection 373.414(7), F.S., regarding any authority granted pursuant to section 373.414, F.S. (1991):"

12. Florida Administrative Code Rule 17-340.750 was transferred to Rule 62-340.750, which reads:

Construction, alteration, operation, maintenance, removal, and abandonment of stormwater management systems, dams, impoundments, reservoirs, appurtenant works, or works, in, on, or over lands that have become surface waters or wetlands solely because of mosquito control activities undertaken as a part of a governmental mosquito control program, and which lands were neither wetlands nor other surface water before such activities, shall be exempt from the provisions in this chapter adopted by the District to implement subsections 373.414(1) through (6); 373.414(7), F.S., regarding any authority granted pursuant to Section 373.414, F.S. (1991); 373.414(8) and 373.414(10), F.S.

13. Florida Administrative Code Rule 40D-4.051(10) also

provides for the following exemption from environmental resource permitting for surface waters or wetlands created by mosquito control activities:

Construction, alteration, operation, maintenance, removal, and abandonment of stormwater management systems, dams, impoundments, reservoirs, appurtenant works, or works, in, on, or over lands that have become surface waters or wetlands solely because of mosquito control activities undertaken as a part of a governmental mosquito control program, and which lands were neither wetlands nor other surface water before such activities, shall be exempt from the provisions in this chapter adopted by the District to implement subsections 373.414(1) through (6); 373.414(7), F.S., regarding any authority granted pursuant to Section 373.414, F.S. (1991); 373.414(8) and 373.414(10), F.S.

14. Rule 62-330.100(1) provides in pertinent part:

The Department hereby adopts by reference certain Environmental Resource Permit rules of the water management districts to be used by the Department in conjunction with Rule Sections 62-312.020 and 62-312.400-- .470, and Rule Chapters 62-4, 62-40, 62-45, 62-101, 62-103, 62-113, 62-160, 62-300, 62-302, 62-340, 62-341, 62-342, 62-343, 62-520, 62-522, 62-550, F.A.C., whenever, pursuant to the operating agreements authorized under Section 373.046(4), F.S., it exercises its independent authority under Part IV, Chapter 373, F.S., to regulate surface water management systems, including activities in, on or over wetlands or other surface waters.

15. In Rule 62-330.200(3)(b), DEP specifically adopts by reference various rules of the Southwest Florida Water

Management District (SWFWMD), including Rule 40D-4.051, in conjunction with the general adoption by reference in Rule 62-330.100(1).

16. Florida case law holds that exemptions must be strictly construed against the party claiming the exemption and in favor of the public. See Robinson v. Fix, 113 Fla. 151, 151 So. 512 (Fla. 1933); Pal-Mar Water Management District v. Martin County, 384 So. 2d 232 (Fla. 4th DCA 1980). For that reason, the burden was on Petitioner to prove entitlement to the mosquito control ditch exemption. See Green v. Pederson, 99 So. 2d 292, 296 (Fla. 1957)("It is well settled that he who would shelter himself under an exemption clause in a tax statute must show clearly he is entitled under the law to [the] exemption."). See also Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932, 933-34 (Fla. 1996); Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

17. As found, Petitioner did not prove by a preponderance of the evidence that the surface waters or wetlands on his property "have become surface waters or wetlands solely because of mosquito control activities

undertaken as a part of a governmental mosquito control program" and that they "were neither wetlands nor other surface water before such activities." (Emphasis added.)

RECOMMENDATION

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

RECOMMENDED that DEP enter a final order denying Petitioner's request for an exemption.

DONE AND ENTERED this 24th day of August, 2005, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
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 August, 2005.

ENDNOTES

1/ The application and agency action cited Rule 40D-4.051(14), but the correct current citation is to section (10) of the Rule.

2/ E.g., "it's" in the first sentence, paragraph 18, should be changed to "its"; the extra word at the end of paragraph 19 should be deleted; "except those found on elevated spoil piles)" should be added to the end of last sentence, paragraph

26(1); "in the Wetlands Delineation Manual" should be added to the end of the first clause, third sentence, paragraph 38; "not" before "classified" in fifth sentence, paragraph 41, should be stricken; "compromise" in second sentence, paragraph 43, should be changed to "comprise"; change "epic" in fifth and sixth sentences, paragraph 45, should be changed to "epoch."

COPIES FURNISHED:

Lea Crandall, Agency Clerk
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Greg Munson, General Counsel
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Colleen M. Castille, Secretary
Department of Environmental Protection
The Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Kevin S. Hennessy, Esquire
Lewis, Longman & Walker, P.A.
1001 Third Avenue West, Suite 670
Bradenton, Florida 34205

Nona R. Schaffner, Esquire
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

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.