

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ST. JOHNS RIVER WATER )  
MANAGEMENT DISTRICT, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 08-4359EF  
 )  
FRANK H. AND LINDA M. MOLICA, )  
 )  
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 March 11, 12, and 13, 2009, in Merritt Island and Rockledge, Florida.

APPEARANCES

For Petitioner: Vance W. Kidder, Esquire  
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For Respondents: Frank Henry Molica, Esquire  
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STATEMENT OF THE ISSUES

The issues are (1) whether Respondents, Frank H. and Linda M. Molica, dredged and filled wetlands on their property in

Merritt Island, Brevard County (County), Florida, without a permit and should take certain corrective actions, and (2) whether Respondents' activities are exempt from permitting under Section 373.406(2), Florida Statutes.<sup>1</sup>

PRELIMINARY STATEMENT

On August 8, 2008, Petitioner, St. Johns River Water Management District (District), filed an Administrative Complaint and Proposed Order (Complaint) alleging that "[b]eginning in 2004," Respondents "undertook land clearing, dredging, and filling in the wetland on [their] property without having a current, valid permit from the District"; and that these activities constituted "the construction and operation of a surface water management system and are prohibited unless authorized by a permit issued by the District." The Complaint further described a series of corrective actions that must be undertaken by Respondents, including the option of applying for an after-the-fact permit or restoring the subject property to a condition commensurate with the adjacent wetland system. By an ore tenus motion at final hearing, on which a ruling was reserved, the proposed corrective actions were slightly revised and are reflected in District Exhibit 73. The motion is hereby granted.

On August 25, 2008, Respondents filed their Petition for the purpose of contesting the charges in the Complaint. The Petition generally contended that Respondents were not required to obtain

a permit since their activities qualify for an agricultural exemption under Section 373.406(2), Florida Statutes. The matter was referred by the District to the Division of Administrative Hearings on September 3, 2008, with a request that an administrative law judge be assigned to conduct a hearing. On September 25, 2008, Respondents filed an Amended Petition, which sets out in greater detail the bases for their asserting that they were entitled to an agricultural exemption.

By Notice of Hearing dated September 11, 2008, a final hearing was scheduled on December 16 and 17, 2008, in Cocoa, Florida. On December 1, 2008, Respondents filed an unopposed Motion to Continue Hearing. The final hearing was then rescheduled to March 11 and 12, 2009, in Merritt Island and Rockledge, Florida, respectively. A continued hearing was conducted on March 13, 2009, in Merritt Island, Florida.

Numerous procedural and discovery disputes arose during the course of this proceeding and the rulings on those matters are found in various orders issued in this case.

The parties filed separate Pre-Hearing Statements, as revised, on March 4, 2009. In their filing, Respondents specifically asserted for the first time that "there has been no hardwood swamp or wetland on [the property] in the area where Petitioner claims there to be." At the final hearing, the District presented the testimony of Rita Strickland, who resides near Respondents' property; Frank Henry Molica; Mark E. Crosby,

an Engineer III in the Department of Water Resources and accepted as an expert; Elois S. Lindsey, a Regulatory Scientist II and accepted as an expert; Travis C. Richardson, a Soil Scientist with the Division of Environmental Resource Management and accepted as an expert; Bryan West, an Environmental Specialist II with the Department of Environmental Protection (DEP) and accepted as an expert; Mykal Kwami Pinnick, a former Brevard County biologist and accepted as an expert; and Lance D. Hart, Manager of Technical Programs and accepted as an expert. Also, it offered District Exhibits 1-6, 8-10, 12-15, 22, 45, 47-50, 52, 57, 62-67, and 73, which were received in evidence. Respondents presented the testimony of Philip Molica, a professional land surveyor and accepted as an expert; Richard Kern, a professional engineer and accepted as an expert; Gregory J. Sawka, a soil consultant and accepted as an expert; and Brooks Humphreys, an agronomist and accepted as an expert. Also, they offered Respondents' Exhibits 1, 2A and B, 3A-F, 4, 5A-K, 6, 7, 9, 10, 12A-C, 14, 16A-D, and 17-22. All were received except Exhibit 7, the deposition of Richard Szpyrka, County Land Development Engineer, upon which a ruling was reserved. The objection is overruled and the exhibit is received. Finally, the undersigned granted Motions for Official Recognition by both parties.<sup>2</sup>

The Transcript of the hearing (five volumes) was filed on April 24, 2009. At hearing, the parties agreed that proposed recommended orders would be due within thirty days after the

filing of the transcript. Proposed Orders were timely filed, and they have been considered 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 1990, Respondents purchased a 3.47-acre, rectangular-shaped parcel at 2050 North Tropical Trail, Merritt Island, Florida, which is located within the regulatory jurisdiction of the District. See § 373.069, Fla. Stat. The parcel identification number is 24-36-15-00-00764-00000.00. The property is less than a mile south of State Road 528 (A1A), approximately one-half mile west of State Road 3 (North Courtney Parkway), and around one-half mile east of the Indian River.

2. The property is bounded on its western side by a roadway known as North Tropical Trail, on the south side by a drainage ditch, and on the east side by another drainage ditch. Further to the east of the drainage ditch on the eastern side of the property are a holding pond and a subdivision known as Copperfield Subdivision developed in 1993, while a nursery is located just south of the drainage ditch on the southern side. The northern boundary of the parcel is five hundred twenty feet long and is adjoined by a vacant parcel of land similar in size to the Molica parcel and which is owned by the Lacanos. The

Lacano property is largely a wetland. To the north of the Lacano property is a parcel owned by the Stricklands. Historically, the natural flow of water in the area was north to south, that is, from the Stricklands to the Lacanos to the Molica's property, and then to the drainage ditch on the south side of the Molica's property.

3. When Respondents purchased the property in 1990, citrus trees were located "mostly in the front half," or western side of the property, "but they were also located in the rear scattered throughout." There was also "weed grass" or "mini grass" throughout the entire parcel.

4. In 2002 or 2003, the citrus industry was economically hurt by a drop in prices due to various problems, and it became difficult to find fruit pickers or purchasers for the fruit. Because of these conditions, and pursuant to a recommendation by another citrus grower, Respondents state that they began to "transform their property to palm tree production."

5. In late 2003, Respondents began removing orange trees and clearing the land; this continued throughout 2004. At the same time, they began to remove vegetation from the eastern half of the property, which included the excavation of the vegetation, soil, and roots. This was accomplished by the use of heavy equipment, including a tracked cab with hoe, a bobcat with front end loader bucket and root rake, and a wheeled tractor with front end root rake. This is confirmed by photographs taken of the

property in April and December 2004. See District Exhibits 8 through 10. Also, a few cabbage palms were removed that were damaged during the clearing process, as well as trees damaged by hurricanes that struck the east coast of Florida in 2004. The vegetation and soil were trucked off-site for disposal, and new soil or fill was placed throughout the eastern half of the property in which vegetation and soil had been excavated. In some cases, the fill measured as high as thirty-three inches but averaged around one foot in height. There is no dispute that dredging (or excavation) and filling on the property occurred. Respondents did not obtain an Environmental Resource Permit (ERP) before performing this work.

6. On December 13, 2004, the County received a complaint (generated by Mrs. Strickland, the neighbor to the north) about "heavy machinery operating in a wetland" on the Molica property. Mr. Pinnick, who was charged with enforcement of County environmental ordinances, visited the subject property to determine whether a violation of an ordinance had occurred. He observed heavy machinery operating on the central and eastern sides of the property and took several photographs of the site. See District Exhibit 12. He also observed vegetation and muck soil in the disturbed area and standing water in the ditch to the south and concluded that wetlands were being impacted. It is fair to infer that he then notified the DEP about the incident.

7. On December 15, 2004, Mr. Pinnick, accompanied by two DEP employees, Mr. West and his supervisor, Ms. Booker, visited the site and met Mr. Molica and his consultant. At that time, "clearing and [dredging and filling] of wetland at rear [or east end] of Molica's property [was observed]." See District Exhibit 49. The DEP requested that Respondents' consultant "flag a [wetland] line and then Molica have all fill within wetland area removed." The DEP also advised Mr. Molica that "[a]rea then needs to be restored to natural grade." Id. Notes taken by Mr. Pinnick confirm that Mr. Molica agreed to remove the fill "to restore the natural grade and the wetland boundary would be delineated [by Mr. Molica's consultant.]" See District Exhibit 52. The conclusion of both the County and DEP was that wetlands were present in the central part of the property. No formal delineation of wetlands was performed by them since the parties reached an understanding that Mr. Molica's consultant would perform this task. Because Mr. Molica thereafter denied access to the property, this would be the last time regulatory personnel were able to make an on-site inspection of the property until October 2008, when the District obtained an Order authorizing them to inspect the property.

8. The County later charged Respondents with violating the County Code ("prohibitions in functional wetlands"), and the matter was considered by a Special Magistrate. An Order of Dismissal was entered by the Special Magistrate on February 1,



2006, on the grounds the property was zoned agriculture and enjoyed an agricultural exemption, and Respondents agreed to use Best Management Practices, as prescribed by the Department of Agriculture and Consumer Affairs. See Respondents' Exhibit 4. However, neither the DEP nor the District was involved in that action, and the matter concerned an alleged violation of a local ordinance, and not a provision in Chapters 373 or 403, Florida Statutes.

9. At some point in time, but presumably after the site visit in December 2004, Mr. Molica asserted to the DEP that he was conducting an agricultural operation. In early 2005, the DEP referred the matter to the District since the two agencies have an operating agreement concerning which agency will handle certain types of permitting and enforcement matters. By letter dated August 15, 2005, Mr. Molica advised the local District office in Palm Bay, Florida, that the owners of the property were engaging in agricultural activities and denied that any unauthorized fill and excavation activities had occurred. He also requested copies of any statutes, rules, or case law that supported the District's position. See Respondents' Exhibit 2A. On August 3, 2007, the District advised Mr. Molica by letter that it had received a complaint from DEP, that the matter had not yet been resolved, and that it wished to inspect his property to determine if unauthorized fill and excavation activities had occurred. See Respondents' Exhibit 2B. According to a District

witness, the delay in responding to Mr. Molica's letter was caused by the building boom occurring in 2005 and 2006, which required action on numerous pending permits, and in-house confusion over whether the DEP or District had jurisdiction to handle the complaint. There is no evidence to suggest that at any time the District agreed that the activities were lawful, or that the delay in responding to Mr. Molica's letter prejudiced Respondents in any manner.

10. After conducting a preliminary investigation, which included a review of aerial photographs of the area, wetland maps, and soil maps, a visual inspection taken from the Copperfield Subdivision to the east and North Tropical Trail from the west, and a flyover of the property, the District issued its Complaint on August 8, 2008.

B. Are there wetlands on the property?

11. To determine whether wetlands were present on the Molica property, the District made a site inspection on October 22, 28, 29, and 30, 2008. Besides making a visual inspection of the property, the staff took photographs, performed twenty-nine soil borings on both the Molica and Lacano properties, reviewed soil surveys for the area, completed one west-to-east transect and five north-to-south transects to determine locations of hydric soils and any fill materials, and observed lichen and water stain lines on trees. The locations of the various soil borings are depicted on District Exhibit 22.

Finally, the staff examined a series of aerial photographs of the property.

12. Under the wetland delineation rule, three different indicators are used to make that determination: vegetation; soils; and signs of hydrology. See Fla. Admin. Code R. 62-340.300(2)(a)-(d). In addition, where the vegetation and soil have been altered by man-induced factors so that the boundary between the uplands and wetlands cannot be delineated by use of Rule 62-340.300(2), such a determination shall be made by using the most reliable information and "reasonable scientific judgment." See Fla. Admin. Code R. 62-340.300(3)(a). The parties presented conflicting evidence on the wetland issue; the District's evidence has been accepted as being the more persuasive and credible and supports a finding that the areas where dredging and filling occurred in the eastern and central parts of the property meet the test for a wetland.

a. Wetland Soils

13. Muck presence is a hydric soil indicator and also a wetland indicator. The District's expert, Mr. Richardson, established that the soil on the property where the dredging and filling occurred was hydric in nature, and therefore indicative of a wetland. Although Respondent's soil expert disagreed with this conclusion, he generally agreed with Mr. Richardson's methodology, and he agreed that muck was present below the fill material.

b. Wetland Vegetation

14. The presence or absence of wetland vegetation is another factor to consider in deciding whether an area is or was a wetland. Wetland hardwood trees, and not grass planted on top of the fill, are more appropriate for evaluating whether the area in which the trees are located was a wetland. Large trees, estimated to be fifty to sixty years old, remain on the property in the vicinity of certain District soil borings. They include boring 20 (swamp tupelo); borings 3, 4, and 5 (red maple, American elm, and holly); and borings 9 and 10 (maple and American elm). These are all wetland canopy species and provide further support for the District's position.

c. Hydrologic Indicators

15. Algal matting is found on the surface of the property in the vicinity of borings 3, 4, 5, 8, and 9. Algal matting occurs because water has inundated the surface of the ground sufficiently long for algae to grow in the water and then remains on the ground surface after the water no longer covers the ground. Rainfall alone does not produce algal mats.

16. Trees on the property provided evidence of being in saturated or inundated soil conditions through the morphological adaptation of buttressing and adventitious roots, particularly in the vicinity of District borings 20, 8, 9, and 10. Also, the trees had lichen lines on them, which are indicators of seasonal high water inundation elevations in wetlands.

17. The presence of muck soils is a hydrologic indicator. As noted above, the District determined through soil borings that muck was under the fill that had been placed on the property.

d. Reasonable Scientific Judgment

18. The evidence established that there was significant alteration to the soils and vegetation across the central and eastern parts of the subject property due to man-induced factors of vegetation removal, dredging, and filling. Through consideration of the most reliable information available, including aerial photographs, the remaining trees on the site, hydrologic indicators, the presence of hydric soils, coupled with reasonable scientific judgment, the evidence established that the areas where the recent dredging and filling occurred met the wetland delineation test in Florida Administrative Code Rule 62-340.300(3).

C. Agricultural Exemption

19. Mr. Molica is a full-time practicing attorney. His wife is his legal secretary. Respondents contend that since they purchased the property in 1990, they have been continuously engaged first in the occupation of citrus farming, and then beginning sometime in 2004 in the production of palm trees. Therefore, they assert they are entitled to the exemption provided under Section 373.406(2), Florida Statutes. That provision states in relevant part that "[n]othing herein . . . shall be construed to affect the right of any person engaged in

the occupation of . . . horticulture . . . to alter the topography of any tract of land consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters." The parties agree that the burden of proving entitlement to this exemption rests on Respondents.

20. When the property was purchased in 1990, there were citrus trees on the land, mainly in the western half. A few navel oranges were later added, and some citrus trees were removed at that time. Beginning at the end of 2003, and continuing in 2004, the citrus trees were removed. At the time of the DEP inspection in December 2004, no potted palm trees were observed on the property. The precise date when they were first placed on the property is not clear. Photographs taken in January 2006, more than a year after the dredging and filling and just before the County code violation charge was resolved, reflect around fifty or so small trees in pots located in a small, cleared section of the property. See Respondents' Exhibit 18. Photographs taken three years later (January 2009), long after the dredging and filling occurred, show a comparable number of small palm trees in pots placed on what appears to be the same part of the property. See Respondents' Exhibit 21. Mr. Molica also submitted numerous documents (dated 2005 and later) downloaded from the internet by his wife which pertain to palm trees, see Respondents' Exhibit 20; and he stated that a

marketing plan for the sale of palm trees has been developed, which was simply a goal of selling the trees after they were ten years old. He further stated that he intends to work the "farm" as a business full-time after retiring from his law practice. Finally, he presented the testimony of an agronomist who stated that clearing property, filling holes, smoothing land, and building an access road are normal agriculture activities.

21. It is fair to infer from the record that Respondents' activities can be characterized as an avocation, not an occupation. Notably, there is no evidence that since they purchased the property in 1990, Respondents have sold any citrus fruit or a single palm tree.

22. There is no evidence that dredging and filling in wetlands is a normal agriculture practice, or that it is consistent with the practice of horticulture, including the growing of exotic palm trees. Mr. Molica's agronomist acknowledged that he has never been associated with an application to conduct agricultural or horticultural activities that involve the filling of wetlands. Moreover, extensive dredging, filling, and removal of vegetation were not necessary to accommodate the small area on which the potted plants sit. The more persuasive evidence supports a finding that the topographic alterations on the property are not consistent with the practice of agriculture.

23. The evidence shows that the filling on the property has obstructed the natural flow of surface water. More than likely, the filling of the wetlands was for the predominant purpose of obstructing and diverting surface water that flowed south from the Lacano property, and not for the purpose of enhancing horticultural productivity.

D. Corrective Actions

24. At hearing, the District submitted certain revisions to the proposed corrective action, which are described in District Exhibit 73. The revisions provide greater specificity regarding the formulation of a restoration plan and who must be involved in formulating that plan. In general terms, the corrective action offers Respondents the option of seeking an after-the-fact permit or restoring the wetlands. Respondents offered no proof at hearing that the original or revised corrective action is unreasonable. The revised corrective action is found to be reasonable and designed to address the restoration needs of the property and is hereby approved.

CONCLUSIONS OF LAW

25. 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.

26. Section 373.119(1), Florida Statutes, authorizes the District to issue a complaint when it has reason to believe that



a violation of any provision of Chapter 373, Florida Statutes, or a District rule has occurred.

27. Florida Administrative Code Rule 40C-4.041(2)(b)8. requires that an ERP be obtained "prior to the construction . . . [or] operation of a surface water management system which . . . is wholly or partially located in, on, or over any wetland." The term "construction" is defined in Florida Administrative Code Rule 40C-4.021(7) to mean "any activity including land clearing [or] earth moving . . . which will result in the creation of a system." The term "operation" means "to cause or to allow a system to function." See § 2.0(11), Applicant's Handbook. Florida Administrative Code Rule 40C-4.021(27) defines the terms "surface water management system" or "system" to include areas of dredging and filling wetlands. Therefore, if the area in which Respondents dredged and filled was a wetland, this activity constituted the construction and operation of a surface water management system requiring an ERP.

28. For the reasons previously found, the more credible and persuasive evidence supports a conclusion that Respondents dredged and filled wetlands on their property without first obtaining an ERP. Therefore, the charge in the Complaint has been sustained.

29. Respondents claim they are entitled to an agricultural exemption under Section 373.406(2), Florida Statutes. An exemption is strictly and narrowly construed against the person

claiming the exemption. See, e.g., Pal-Mar Water Management District v. Board of County Commissioners of Martin County, et al., 384 So. 2d 232, 233 (Fla. 4th DCA 1980). Under the statute, three issues must be evaluated in order to determine if an activity qualifies for an exemption. First, Respondents must be engaged in the occupation of agriculture or horticulture. Second, the topographic alteration must be consistent with the practice of agriculture. Finally, the alteration must not be for the sole or predominant purpose of impounding or obstructing surface waters.

30. The more persuasive evidence supports a conclusion that Respondents are not engaged in the occupation of palm tree production; that the topographic alterations are not consistent with the practice of agriculture; and that the alterations on the property were for the sole or predominant purpose of impounding or obstructing surface waters. Therefore, they are not entitled to an exemption.

31. Finally, Respondents cite the recent case of A. Duda and Sons, Inc. v. St. Johns River Water Management District, 34 Fla. L. Weekly D972 (5th DCA, May 15, 2009), for the proposition that if the predominant effect of their agricultural activity has a purpose consistent with the practice of agriculture, then the activity is exempt from the District's permitting requirements even if that activity has more than an incidental effect of impounding or obstructing surface waters. As previously found,

however, the predominant purpose of the dredging and filling was not to enhance agricultural or horticultural productivity, but rather to obstruct the surface water runoff from the upgradient properties. Given this factual record, the Duda case does not mandate a different result.

RECOMMENDATION

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

RECOMMENDED that a final order be entered sustaining the charges in the Complaint, requiring Respondents to take the corrective actions described in District Exhibit 73, and determining that Respondents are not entitled to an agricultural exemption under Section 373.406(2), Florida Statutes.

DONE AND RECOMMENDED this 12th day of June, 2009, in Tallahassee, Leon County, Florida.



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DONALD R. ALEXANDER  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of June, 2009.

ENDNOTES

1/ All statutory references are to the 2008 version of the Florida Statutes.

2/ The officially recognized matters include Chapters 373 and 403, Florida Statutes (2007); Florida Administrative Code Rule Chapters 40C-4, 62-345, and 62-340; St Johns River Water Management District Applicant's Handbook for Management and Storage of Surface Waters (May 13, 2008), Sections 1-1 through 3-15, 7-1 through 7.6, 8.1 through 10.8, and 12.1 through 12.58; Delegation of Authority from the Florida Department of Environmental Protection; Conference Committee Report on CS/CS/HB 1187, Journal of the Florida House of Representatives, May 29, 1984, page 734 and Journal of the Florida Senate, May 28, 1984, page 475; Model Water Code Commentary for Chapter 4 and Sections 4.01 through 4.04; Chapter 93-213, Laws of Florida, pages 2129-33, 2137, 2143-54, and 2157; Part VIII, Chapter 403, Florida Statutes (1991), pages 1718-1724; Florida Administrative Code Rule 5E-1.023; the fact that Part IV, Chapter 373, Florida Statutes, is based on the Model Water Code; the Applicant's Handbook: Agricultural Surface Water Management Systems, December 3, 2006; and "the official seal of the Brevard County Property Appraiser, a governmental agency, together with the photographs upon which such seal is embossed."

COPIES FURNISHED:

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NOTICE OF RIGHT TO FILE 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.