

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SPOTS, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 10-0635
)
 SOUTH FLORIDA WATER MANAGEMENT)
 DISTRICT AND DANIEL BORISLOW,)
 LLC,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

On June 9, 2010, a hearing was held in this case in West Palm Beach before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Joel T. Daves, Esquire
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For Respondent South Florida Water Management District:

Douglas H. MacLaughlin, Sr., Esquire
South Florida Water Management District
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For Respondent Daniel Borislow, LLC:

Daniel Borislow, pro se
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STATEMENT OF THE ISSUE

The issue in this case is whether the South Florida Water Management District (SFWMD) should grant the application of Daniel Borislow, LLC, for an after-the-fact Environmental Resource Permit (ERP) and issue ERP 50-09272-P.

PRELIMINARY STATEMENT

SFWMD cited Daniel Borislow, LLC (Borislow), for installing a surface water management system without the required ERP near the corner of Congress Avenue and Summit Boulevard in West Palm Beach. To resolve the enforcement action, Borislow agreed to apply for an after-the-fact ERP. Eventually, SFWMD noticed its intent to grant the application and issue ERP 50-09272-P. Mark Rowan challenged proposed ERP 50-09272-P on behalf of the adjoining property owner under Sections 120.569 and 120.57(1), Florida Statutes.¹ SFWMD referred the matter to DOAH for a hearing. Spots, Inc. (Spots), the owner of adjoining property, was substituted for Rowan as the proper Petitioner.

At the final hearing, Borislow called two witnesses (Daniel Borislow and Robert Rennebaum, P.E., an expert in civil engineering) and had Applicant's Exhibits 1-4 admitted in evidence. SFWMD called three expert witnesses (Anthony Waterhouse, P.E., an expert in civil engineering, and John Meyer and Robert Hopper, experts in wetland delineations, impacts, and mitigation) and had District Exhibits 1, 2, 4, 8,

9, and 10 admitted in evidence. Petitioner called five witnesses (Borislow, Bill Ruch, Rolando Gonzalez, Steve Hamilton, and Brian LaMotte, P.E., an expert in civil engineering) and had Petitioner's Exhibits 1-10 admitted in evidence.

A Transcript of the final hearing was filed on July 8, 2010. The time to file proposed recommended orders (PROs) was extended by agreement of the parties to July 30, 2010. Spots' PRO was filed on July 19, 2010, and SFWMD's PRO was filed on the due date. Borislow did not file a PRO. The PROs have been considered.

FINDINGS OF FACT

1. In 2007, Borislow bought 6.2 acres of land near the corner of Congress Avenue and Summit Boulevard in West Palm Beach. Borislow proceeded to create a soccer field on the property. The project required the addition of fill, the grading and leveling of the field and a shellrock driveway/parking area, and the installation of sod, an irrigation system, an exfiltration trench for water quality treatment, and lighting.

2. Later in 2007, Borislow's activities came to the attention of SFWMD, which cited Borislow for conducting activities requiring an ERP without applying for and obtaining one.

3. To resolve the enforcement action, Borislow agreed to apply for an after-the-fact ERP. Initially, SFWMD estimated primarily from aerial photography that 0.71 acres of wetlands were filled and impacted. During the permitting process, SFWMD's estimate of direct wetland impacts was reduced to 0.50 acres, and the mitigation required for direct and secondary² wetland impacts was determined using the Wetland Rapid Assessment Procedure (WRAP).³ It was determined that Borislow's purchase of 0.2 of a freshwater herbaceous wetland credit in the Loxahatchee Mitigation Bank would offset the project's wetland impacts. SFWMD staff determined that all ERP criteria were met.⁴

4. Spots stipulated that there are no water quality issues, that no wetland-dependent endangered or threatened species of special concern have been observed at or in the area of the project site, and that the potential use of the site by such species is minimal.⁵ Spots contends: SFWMD underestimated the extent of impacted wetlands (and, therefore, the amount of mitigation did not offset the wetland impacts); reasonable assurance was not given that the project will not flood the Spots property to the north, in violation of permitting criteria in Florida Administrative Code⁶ Chapter 40E-4 and SFWMD's Basis of Review for ERPs (BOR); and reasonable assurance was not given that water storage and conveyance capabilities would not be adversely impacted, in violation of the permitting criteria in

Rule Chapter 40E-4 and the C-51 basin compensating water storage requirements of Rule Chapter 40E-41, Part III.

5. In normal permitting, existing wetlands are delineated in accordance with Rule Chapter 62-340. In this after-the-fact permit application, former wetlands had to be estimated. Spots reasonably contends that Borislow should not benefit from having filled wetlands without an ERP. But the evidence proved that the former wetlands on the Borislow property were properly estimated. Contrary to the contention of Spots, the wetlands were not estimated on the basis of a single aerial photograph. There were numerous aerial photographs over several years, which the experts could interpret and use to make a reasonable estimate of the extent of the former wetlands on the site.

6. Ironically, while criticizing SFWMD's alleged reliance on a single aerial photograph to determine the extent of the former wetlands, Spots relied on a single aerial photograph to claim that the former wetlands on the Borislow property were deep and larger than 0.5. acres. The photograph appeared to show standing water only on the Borislow property, but it is possible that standing water on the Spots property was obscured by vegetation. In addition, it is impossible to determine the depth of the water from the aerial photograph, and there was no evidence as to the rainfall preceding the aerial photograph.

7. Spots provided no other evidence to support its claim that more mitigation is needed to offset the wetland impacts.

8. On the issue of flooding the Spots property, the evidence was clear that, contrary to the drawings in the ERP, the highest elevations in the northwest corner of the Borislow property are several feet south of the Borislow/Spots property line,⁷ and several feet higher than the elevation at the property line,⁸ causing surface water to flow down this slope from the Borislow property onto the Spots property. The evidence proved that no such "back-flow" existed in that location before the project. This "back-flow" can be prevented from crossing the property line by placing a swale or railroad tie or some other similar vertical retaining wall near or on the property line. Borislow has agreed to an additional ERP condition that this be done.

9. The Borislow property is in sub-basin 30 of the C-51 basin. Spots and its engineering expert criticized the engineering calculations used by the experts for Borislow and SFWMD to provide reasonable assurance that the project did not result in a net decrease in water storage capacity in the basin. Spots contended that the calculations incorporated pre-development elevations taken from a 2005 aerial photograph. However, the more persuasive evidence was that the elevations used in the calculations actually came from survey information

on surrounding properties, including the Spots property and Summit Boulevard, plus the control elevation in nearby Lake Worth Drainage District L-5 Canal. Elevations for the former wetlands on the Borislow property were assumed to be 10 feet NGVD⁹ based on the actual elevations of the existing wetlands on the Spots property. The testimony of the experts for Borislow and SFWMD as to the source of the elevations used in the calculations is accepted.

10. The engineering calculations developed by Borislow's expert and accepted by SFWMD indicated a net increase in water storage capacity as a result of grading and leveling the property.¹⁰ The calculations compared pre-development and post-development storage capacity between the water table¹¹ and the 100-year storm elevation, which was calculated to be 14.1 feet NGVD. The evidence did not adequately explain how grading and leveling the Borislow property would increase water storage; it would seem that no change in water storage would result.

11. The engineering calculations assumed that no fill was deposited on the property. However, the evidence was that 150 to 300 truckloads of fill, each with 17 to 18 cubic yards, for a total of 2,625 to 5,250 cubic yards, were delivered to and placed on the property. If 300 truckloads were used, this would represent as much as an acre-foot of fill.¹² Although the fill would have some water storage capacity, adding that much fill to

the property logically would result in a net decrease in water storage capacity in the C-51 basin. This loss was not quantified, or compensated.¹³

12. Borislow testified that the fill was used to construct a 13-foot high, 330-foot long, 30-foot wide berm along the western perimeter of the property and another large berm along the northern and southern perimeters of the soccer field.¹⁴ But other evidence does not support Borislow's testimony. According to the drawings in the ERP, there are a total of 370 feet of berms, which are required to be a minimum of six inches high to maintain elevation 13.4 feet NGVD to contain the peak stage of a 10-year, 3-day design storm.¹⁵ Based on the ground level photographs in evidence, the berms do not appear to be anywhere near 13 feet high or 30 feet wide. In any event, the evidence does not prove that the fill deposited on the property was higher than 14.1 feet NGVD. Regardless of the exact dimension of the berms, it appears that the fill was deposited in a way that would result in a net decrease in water storage capacity in the C-51 basin.

13. SFWMD seems to suggest in its PRO that the fill should be disregarded because there were no records to confirm the dates it was delivered, or the amounts delivered, and because it might have been delivered to an adjacent property.¹⁶ But the burden of proof was on Borislow. See Conclusion of Law 16, infra. There

was no evidence to prove that Borislow had the fill deposited on an adjacent property. It is more likely that the fill was deposited on the Borislow property in large part to fill the former wetland, which probably was lower than 10 feet NGVD.

14. Spots also charged that Borislow's project essentially obstructs the previous flow of surface water from the wetlands on the Spots property into the wetlands on the Borislow property, such that surface water now backs up on the Spots property. This appears to be true. Since it appears that the wetlands on the Borislow property were lower than the wetlands on the Spots property, grading and leveling would have that effect; adding fill would exacerbate the effect.

15. Spots also argued that the evidence did not provide reasonable assurance on the ability of Borislow's system to recover from a 10-year, three-day storm event, so as to be able to again retain the surface water runoff from a successive storm of that magnitude and duration 12 days later. But the persuasive evidence was to the contrary, primarily due to the major drainage features in the vicinity--namely, the C-51 and the L-5 canals.

CONCLUSIONS OF LAW

16. As applicant, Borislow has the burden to prove entitlement to an after-the-fact ERP. Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

17. J.W.C. allows the burden of going forward with the presentation of evidence to shift to a third-party challenger after when the applicant makes a prima facie case. Id. Spots argued based on J.W.C. that Borislow's application for an after-the-fact ERP must be denied because Borislow did not make a burden-shifting prima facie case during its case-in-chief. But the burden-shifting allowed by J.W.C. is not a mandatory "blueprint governing . . . exact procedure." Id. In this case, it was appropriate to consider the evidence presented in SFWMD's case-in-chief before determining whether the evidence proved Borislow's entitlement to an ERP.

18. The ERP criteria applicable in this case are found in Rule Chapters 40E-4 and 40E-41, Part III, and in the BOR. Only the criteria in dispute are addressed here.

19. Rule 40E-4.301(1) provides, in pertinent part, that "an applicant must provide reasonable assurance" that its project:

- (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;
- (d) Will not adversely impact the value of functions provided to fish and wildlife and

listed species by wetlands and other surface waters;

* * *

(f) Will not cause adverse secondary impacts to the water resources;

* * *

(k) Will comply with any applicable special basin or geographic area criteria established in Chapter 40E-41, F.A.C.

20. Rule 40E-41.263(3) adds this ERP criterion for projects in the C-51 Basin:

No net encroachment into the floodplain shall be allowed. Any water storage volume removed from the floodplain must be accommodated by an equal volume of open storage compensation. Water storage volume shall be computed by utilizing Figure 41-9. For the purposes of this part, the minimum volume of water which must be accommodated on site shall be that quantity equal to the volume stored below the level shown on Figure 41-9 and above the existing grades. Compensation for any reduction in soil storage also shall be accommodated on site.

21. Reasonable assurance has been given that the project's wetland impacts have been mitigated. Reasonable assurance also was given that the Borislow project will not discharge offsite in a 10-year, three-day storm event and will recover from such a storm event within 12 days, as required by BOR Section 6.9. However, reasonable assurance was not given that the project, as constructed, will not flood the Spots property (by surface water back-flow from the Borislow property and by blocking the

previous flow of surface water from the Spots property to the Borislow property), or that C-51 Basin water storage loss has been compensated. Borislow has agreed to a condition to address the back-flow, but that condition does not address or meet the other reasons why Rules 40E-4.301(1)(a)-(c) and (k) and 40E-41.263(3) are not met. The record evidence would not support findings as to what additional ERP conditions might be imposed to meet ERP criteria.

RECOMMENDATION

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

RECOMMENDED that SFWMD deny Borislow's after-the-fact ERP.

DONE AND ENTERED this 10th day of August, 2010, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of August, 2010.

ENDNOTES

1/ All statutory references are to the 2009 codification of the Florida Statutes.

2/ The secondary impacts were to a narrow fringe of wetlands on the Spots property. Secondary wetland impacts usually are mitigated by use of buffers, but these impacts are immediately adjacent to the direct impacts to the former wetlands on the Borislow property.

3/ No evidence was presented as to why WRAP was used instead of the Uniform Mitigation Assessment Methodology (UMAM) found in Florida Administrative Code Rule Chapter 62-345.

4/ The Loxahatchee Mitigation Bank and the Borislow property are in the same drainage basin, so there is no question of cumulative impacts under Rule 40E-4.302(1)(b) and Basis of Review Section 4.2.8.

5/ In the Joint Prehearing Stipulation, Spots raised an additional issue as to the adequacy of the penalty imposed by SFWMD for Borislow's not getting an ERP before undertaking project, but this issue was dropped. Spots' PRO appears to raise yet another issue, as to compliance with the proposed ERP's prohibition against converting from the construction phase to the operation phase until as-built certifications are submitted and accepted by SFWMD, but this issue was not raised previously and is untimely. In addition, this prohibition is standard ERP condition language that is not applicable to an after-the-fact ERP.

6/ All rule references are to the version of the Florida Administrative Code in effect at the time of the hearing.

7/ The strip of "back-slope" is between approximately 5 or 6 feet and 10-12 feet wide, and between 100 and 220 feet long.

8/ The difference in elevation between those two points is between approximately 2-4 feet and 5 feet.

9/ NGVD stands for the National Geodetic Vertical Datum of 1929.

10/ These calculations appropriately did not rely on storage volume from exfiltration trenches Borislow had installed for

water quality treatment since there was no evidence that soil excavated from the trenches was not deposited on the property.

11/ The water table was assumed to be 8.5 feet NGVD, based primarily on the control elevation in the nearby L-5 canal.

12/ 5,250 cubic yards equals 141,750 cubic feet, and an acre is 143,750 square feet.

13/ It was not proven that soil excavated for the trenches was removed from the site or that the exfiltration trenches provided any compensation for water storage.

14/ Fill piled above the 100-year storm elevation of 14.1 feet NGVD would not decrease water storage.

15/ In its PRO, SFWMD does not assert the existence of the berms described by Borislow but only states that, if they existed, they were not part of the ERP.

16/ SFWMD states in its PRO: "If such berms exist but were placed on an adjacent property without compensating storage, they were constructed without the appropriate permits from the District."

COPIES FURNISHED:

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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.