

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM CITY CIVIC ORGANIZATION,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 10-2394
)
MARTIN COUNTY AND SOUTH FLORIDA)
WATER MANAGEMENT DISTRICT,)
)
Respondents.)
_____)

RECOMMENDED ORDER

On September 8, 2010, a hearing was held in this case in Stuart, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Marcy I. LaHart, Esquire
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For Respondent South Florida Water Management District:

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For Respondent Martin County:

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Martin County Administrative Center
2401 Southeast Monterey Road
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STATEMENT OF THE ISSUE

The issue in this case is whether the South Florida Water Management District (SFWMD) should issue Environmental Resource Permit (ERP) 43-02326-P to Martin County for construction and operation of a retrofit surface water management system known as the West Stormwater Treatment Area (STA) of the Old Palm City Phase 3 STA in Martin County.

PRELIMINARY STATEMENT

SFWMD gave notice of its intention to issue ERP 43-02326-P, and Petitioner requested an administrative hearing to dispute the issuance. During pre-hearing proceedings, the issues were narrowed to: whether the County "has sufficient financial, legal and administrative capability to ensure that the activity will be undertaken in accordance with the terms and conditions of the permit"; whether the County "has legally and physically available operation and maintenance access"; and whether flows from the proposed West STA "will be discharged into a ditch that traverses property owned by Petitioner." See Joint Prehearing Stipulation. At the final hearing, the issues were narrowed further to whether the County must obtain ownership of, an easement over, or written authorization to use Petitioner's property for the ERP to issue.

At the final hearing, Martin County called: Greg Nolte, its Project Manager for the West STA; Gary Roderick, its

Environmental Project Manager; Donald Donaldson, P.E., the County Engineer; and Jeffrey Anton, P.E., an engineering consultant for the West STA. SFWMD called Hugo Carter, P.E., a SFWMD engineer who reviewed the project. Petitioner called Robert W. Higgins, P.E., an engineering consultant. The County re-called Mr. Roderick in rebuttal.

Martin County Exhibits C1-C4, C25, and C34 were received in evidence. SFWMD Exhibits D25, D27 and D30a-c were received in evidence. Petitioner's Exhibit P1 was received in evidence. Ruling was reserved on objections to Petitioner's Exhibits P2-P4. Those objections are overruled, and the exhibits are received in evidence. Petitioner also offered the unsigned and uncertified transcripts of two depositions (Mr. Carter and Mr. Waterhouse); objections were sustained, and the transcripts were proffered.

A Transcript of the final hearing was filed on October 15, 2010. At the request of the parties, their proposed recommended orders were filed on November 4, 2010, and have been considered.

FINDINGS OF FACT

1. ERP 43-02326-P is for part of a retrofit project to treat surface water runoff in unincorporated Old Palm City in Martin County before it flows into the South Fork of the St. Lucie River. The project includes an East STA and a West STA. ERP 43-02326-P is for the West STA.

2. The proposed West STA consists of a detention area on County-owned property located east of SW Cornell Avenue, north of SW 36th Street, and south of SW 34th Terrace. The purpose of the detention area is water quality treatment of the runoff by allowing pollutants to settle out while the runoff is detained.

3. The West STA detention area is entirely within County-owned property, with operation and maintenance access to public roads via gently-sloped perimeter berms, at least 20 feet wide beyond the detention area's control elevation water line, and unimproved road right-of-way.

4. The detention area is in the same area where approximately 2.75 acres of wetlands historically have received surface water runoff. Historically, surface water has runoff from that area in a northerly direction across the County-owned right-of-way for SW 34th Terrace, which is unimproved, and through a wetland on the unimproved eastern half of Petitioner's property (which is north of SW 34th Terrace, and east of SW Cornell Avenue), through a County-maintained culvert under SW 34th Street (which is the northernmost extent of Petitioner's property), and through tidally-influenced wetlands and mangroves on privately-owned lands to the north, until it reaches the South Fork of the St. Lucie River.

5. The detention area for the West STA is approximately 4.85 acres. The larger detention area (in comparison to the

historic wetlands in the area) is not for flood prevention but to allow for longer detention and better water quality treatment.

6. The West STA project includes the replacement of an old, rusted culvert under SW Cornell Avenue with two new elliptical culverts having a greater conveyance capacity for surface water flowing in a County-maintained ditch between the culvert and the southwest corner of the detention area. However, the increased capacity is not designed to increase the quantity or flow of water into the ditch leading to the detention area.

7. Near the northeastern corner of the proposed detention area, in approximately the same location from which surface water runoff has flowed from the historic wetlands, a "bubble-riser" outfall is proposed. A bubble-riser is the most benign form of outfall for a surface detention system, having little to no horizontal velocity. It essentially allows water to bubble up from lower elevations to the ground surface.

8. As designed, the West STA will improve water quality and not change water quantity exiting the detention area through the bubble-riser.

9. It is Petitioner's position that its wetland necessarily is part of the West STA since surface water flows through the wetlands between the SW 34th Terrace right-of-way

and the culvert under SW 34th Street. Put another away, Petitioner takes the position that operation of the system requires the County's ability to enter onto Petitioner's property to maintain flows between the SW 34th Terrace right-of-way and the culvert under SW 34th Street.

10. The evidence was that the wetlands on Petitioner's property have functioned to convey surface water runoff for over thirty years. Potential naturally-occurring obstructions, such as vegetative debris and fallen limbs and trees, can be flushed naturally by higher flows. The evidence was that, if any such obstructions have occurred in the last thirty years, they have been flushed at least as far as the County-maintained culvert under SW 36th Street. The evidence was that, except for the County's maintenance of the culvert under SW 36th Street, neither Petitioner, the County, nor anyone else has maintained flow through the wetlands on Petitioner's property for the past 30 years. This evidence suggests that no maintenance of the Petitioner's wetlands will be required in the future.

11. Petitioner cannot alter the wetlands on its property in a manner that would obstruct the flow of surface water runoff between the West STA and the County-maintained culvert. The County's comprehensive plan and land development regulations allow "no impact to wetlands."

12. With or without the West STA, the County can declare an emergency in the event of a natural disaster causing an obstruction of flow through Petitioner's wetlands and enter onto Petitioner's property to clear the obstruction to prevent flooding of Petitioner's property or "upstream" properties under its police powers to protect the health, safety, and welfare of the public. If the County has to take such action and damages Petitioner's property in the process, it would be obliged to restore the property to its previous condition. The County has the financial ability to meet that obligation if it were to arise.

13. With or without the West STA, the County could exercise the power of eminent domain to obtain a property interest in Petitioner's wetlands if it ever became necessary.

14. It could be helpful for the County to have ownership of, an easement over, or written authorization to use Petitioner's property. Such rights would eliminate the potential need to resort to eminent domain and police powers. They are not necessary for reasonable assurance in this case.

15. Petitioner attempted to prove that the County previously admitted to the requirement for the County to obtain ownership of, an easement over, or written authorization to use Petitioner's property by asking for drainage easements in 1977 that were said to be needed for periodic cleaning of excessive

vegetation growth and debris and to allow unimpeded flow of water to prevent flooding of surrounding lowlands following heavy rain. The drainage easements were not provided, and the wetlands have not had to be maintained since 1977. There is no reason to believe that maintenance will be required as a result of the West STA project.

16. Petitioner attempted to prove that both the County and SFWMD previously admitted to the requirement for the County to obtain ownership of, an easement over, or written authorization to use Petitioner's property. The evidence was that the County's engineering consultants considered not having rights of ingress and egress to present problems for ditch maintenance. These comments related to an earlier proposal that would have extended the detention area across the SW 34th Terrace right-of-way and into Petitioner's wetlands. Petitioner opposed that proposal, and the County modified its project to confine the detention area to the County's property and just use prescriptive rights to the historic drainage through Petitioner's wetlands. This eliminated the maintenance access issues previously raised by the County's engineering consultants, leaving only the issue raised by Petitioner in this case as to whether the prescriptive drainage rights are sufficient.

17. Petitioner attempted to prove that SFWMD's acknowledgement of the County's power of eminent domain, together with its requirement that some private owners applying for ERPs for surface water management systems obtain ownership of, an easement over, or written authorization to use a downstream flow-way, amounted to an unpromulgated rule to treat the County differently. Specifically, Petitioner pointed to SFWMD's requests for additional information as to the assurances contained in an ERP application for a private proposal known as the Heritage Preserve in Indiantown. While there may be some basic similarities between the two projects, there appear to be many differences besides the identity of the applicant. (The evidence did not include much detail regarding the Heritage Preserve project). These other differences could explain why ownership of, an easement over, or written authorization to use a downstream flow-way might be required for the Heritage Preserve but not for the County's West STA project.

18. SFWMD does not ignore the reality of the eminent domain and police powers of a governmental applicant. In some cases, the exercise of those powers could be necessary to provide reasonable assurance and meet all permitting criteria. In those cases, an ERP should be conditioned upon the governmental applicant's commitment to exercise those rights as necessary. In this case, where the governmental applicant only

requires the use of historic, prescriptive drainage rights, and no need for future maintenance is anticipated, a commitment to exercise those powers is not necessary to provide reasonable assurance and meet permitting criteria.

CONCLUSIONS OF LAW

19. As applicant, Martin County has the burden to prove entitlement to ERP 43-02326-P. Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

20. The ERP criteria applicable in this case are found in: Part IV of Chapter 373, Florida Statutes; Florida Administrative Code Chapter 40E-4; and SFWMD's Basis of Review for ERPs (BOR). Only the criteria in dispute are addressed here.

21. Rule 40E-4.301(1) provides, in pertinent part, that "an applicant must provide reasonable assurance" that its project: "(j) Will be conducted by an entity with the sufficient financial, legal and administrative capability to ensure that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued" Martin County meets this criterion.

22. BOR Section 7.5 requires minimum perimeter maintenance and operation easements beyond the control elevation water line and connected to a public road or other legally and physically available access point. This requirement applies to the

detention area, not Petitioner's wetlands, and is met in this case.

23. Martin County meets the criteria for issuance of ERP 43-02326-P.

RECOMMENDATION

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

RECOMMENDED that SFWMD enter a final order issuing ERP 43-02326-P.

DONE AND ENTERED this 15th day of November, 2010, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of November, 2010.

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.