



SOUTH FLORIDA WATER MANAGEMENT DISTRICT

FILED

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DIVISION OF
ADMINISTRATIVE
HEARINGS

August 31, 2011

Claudia Llado, Clerk of the Division
State of Florida, Division of
Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

Dear Ms. Llado:

**Subject: Duke's Steakhouse Ft. Myers, Inc. v. G5 Properties, LLC,
and South Florida Water Management District, DOAH Case
No. 10-10443**

Pursuant to subsection 120.57(1)(m), Florida Statutes, enclosed is a copy of the South Florida Water Management District's Final Order in the above referenced matter. The exceptions to the recommended order and responses to those exceptions filed by the parties are also enclosed.

If you have any questions, please call me at 561.682.6259.

Sincerely,

Joyce B. Rader
Paralegal Specialist

JBR
Enclosures

FILED
**BEFORE THE SOUTH FLORIDA
WATER MANAGEMENT DISTRICT**

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SOUTH FLORIDA
WATER MANAGEMENT DISTRICT

Duke's Steakhouse Ft. Myers, Inc.,

DIVISION OF
ADMINISTRATIVE
HEARINGS

Petitioner,

vs.

SFWMD 2011-149-FOF-ERP
DOAH Case No. 10-10443

G5 Properties, LLC, and
South Florida Water Management District,

Respondents.

FINAL ORDER

This matter came before the Executive Director of the South Florida Water Management District¹ for consideration of the Recommended Order issued by the Administrative Law Judge ("ALJ") J. Lawrence Johnston; the exceptions to the Recommended Order submitted by Respondents, District staff and G5 Properties, LLC ("G5" or "Applicant"); and the response prepared by Petitioner, Duke's Steakhouse Ft. Myers, Inc. ("Petitioner"). A copy of the Recommended Order, dated May, 25, 2011, is attached as Exhibit A. Having reviewed the Recommended Order, the record below, and otherwise being fully advised in the premises, the District orders as follows.

¹ Pursuant to Section 373.079(4)(a), Florida Statutes, the District's Governing Board delegated to the Executive Director the authority to take final action on permit applications under part IV of Chapter 373, Florida Statutes. *District's Policies and Procedures, Subsection 101-41(a)*.

THE PROCEEDINGS BELOW

G5 applied for an Environmental Resource Permit ("ERP") to redevelop its property in Fort Myers. The property site is comprised of two adjacent parcels (a northern and southern parcel totaling 3.41 acres) purchased by G5 at separate times. The parcels are surrounded by commercial development to the north, south and west, and residential development to the east. The property and building to the south were purchased by Petitioner in 2008 and, at all times material, has been unoccupied. Transcript of Proceedings ("TR") dated March 16, 2011, at 121-23. The G5 property had been originally developed in the 1970s and 1980s prior to the adoption of the District's ERP program. After G5 completed construction of its redevelopment, Petitioner challenged G5's ERP permit pursuant to Sections 120.569 and .57, Florida Statutes.

G5's redevelopment project included construction of a two-story medical office building and a dry stormwater detention system on its southern parcel. The dry detention system was sized to store and treat stormwater runoff from the southern parcel and the adjoining sub-basin, with discharges from the system being conveyed via a drainage pipe to a road right-of-way to the east, and then into a drainage ditch south of Petitioner's property and, ultimately, to the Caloosahatchee River. RO at ¶ 2. Subsequent modifications to the detention area provided additional storage and water quality treatment for the site for storms bigger than the design storm, i.e., a 25 year/3-day storm. RO at ¶ 8. A portion of the stormwater from a driveway on the northern G5 parcel also drains into the detention system, with the remaining flows discharging into a Florida Department of Transportation swale in the U.S. 41 right-of-

way. RO at ¶¶ 3-4. Testimony at hearing demonstrated that the detention system was designed to prevent flooding to Petitioner's property, that it functions properly, that any post-development runoff from the G5 property to Duke's property would not exceed pre-development conditions, and that any standing water on Petitioner's property after storm events was probably caused by clogs in the drains on the Petitioner's property. RO at ¶¶ 9-14; TR at 43-46; 62.

Although the ALJ concluded that the surface water management system functions properly and that the surface water on Petitioner's property did not come from G5's property, he found that the detention system for the entire site did not meet the criteria for an ERP because there was no showing that it would provide water quality storage and treatment for stormwater runoff from both G5 parcels, regardless of where it went. RO at ¶¶ 16 and 25. "G5 met all the requirements of the [District's Basis of Review] except for sections 5.2.1(a) and 7.4, which relate to water quality storage and treatment." RO at ¶ 25. The ALJ did find, however, that "because of the addition of water quality storage and treatment for the southern parcel and the addition of filters for the drains on the property, the redevelopment of the site resulted in a *net improvement in water quality storage and treatment.*" *Id.* at ¶ 16 (emphasis supplied). The ALJ ultimately concluded that G5's permit application should be denied.

STANDARD OF REVIEW FOR RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with

particularity in the order, that the findings of fact were not based on competent substantial evidence." §120.57(1)(l), Fla. Stat. (2010). A reviewing agency may not reweigh the evidence presented at a final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. See, e.g., *Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005). Nor do agencies have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." See *So. Fla. Cargo Carriers Ass'n, Inc. v. Dept. of Bus. and Prof'l Regulation*, 738 So. 2d 391 (Fla. 3d DCA 1999).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." See *Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001). An agency's review of legal conclusions in a recommended order, however, are restricted to those that concern matters within the agency's field of expertise. See, e.g., *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *G.E.L. Corp. v. Dep't of Env'tl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. See, e.g., *Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1993).

An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So. 2d 987, 989 (Fla. 1985). Considerable deference should be accorded to these agency interpretations, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Collier County Bd. of County Comm'rs v. Fish & Wildlife Conservation Comm'n*, 993 So. 2d 69 (Fla. 2d DCA 2008); *Falk v. Beard*, 614 So. 2d 1086, 1089 (Fla. 1993); *Dep't of Env'tl. Regulation v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985). Furthermore, an agency interpretation of a statute or rule within its regulatory jurisdiction does not have to be the only reasonable interpretation. It is enough if the interpretation is a "permissible" one. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Env'tl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

RULINGS ON EXCEPTIONS

District Staff's Exception No. 1:

District staff takes exception to Conclusion of Law No. 32 in which the ALJ finds that the Petitioner has standing to raise water quality issues in this proceeding in addition to water storage and flooding issues. District staff argues that: (1) standing to challenge the Applicant's permit based upon potential flooding impacts to Petitioner's property does not equate to standing to challenge the permit based upon the completely separate issue of water quality impacts; and (2) the Petitioner did not present evidence at hearing showing that it was affected by adverse water quality impacts from the G5 site.

In some instances, the District may have authority to reject conclusions of law regarding standing, for instance, when standing turns on an interpretation of the District's regulatory jurisdiction. See, *Citizens for Smart Growth, Inc., Kathie Smith, and Odias Smith s. Dep't of Transp., Martin County, and South Fla. Water Mgmt. Dist.*, DOAH Case Nos. 10-3316, 10-3317, 10-3318 Final Order at 7 (South Florida Water Management Final Order, February 10, 2011). However, in this case, the ALJ's conclusion of law is based upon an interpretation of party status in the context of Chapter 120, Florida Statutes. Since this is not an environmental or policy matter in which the District has a special knowledge or expertise, the District does not have substantive jurisdiction that would allow modification or rejection of Conclusion of Law No. 32. District staff's Exception No. 1, accordingly, is denied.

Applicant's Exception and District Staff's Exception No. 2:

The Applicant and District staff take exception to the ALJ's conclusion that the Applicant did not comply with the requirements of sections 5.2.1(a) and 7.4 of the District's Basis of Review ("BOR") (incorporated by reference in rule 40E-4.091, Florida Administrative Code).

Section 5.2.1(a). Respondents dispute the ALJ's conclusion of law that the Applicant did not meet the requirements for onsite volumetric detention for water quality purposes as provided in BOR section 5.2.1(a). RO at ¶¶ 25-26. According to Respondents, the ALJ erred because his interpretation of the BOR fails to recognize the distinction between sites developed after the adoption of the District's ERP program, and sites developed prior to it. The District agrees.

In paragraph 16, the ALJ finds that "[i]f a new development, G5's redevelopment project . . . would not meet the criteria for issuance of an ERP because there was no demonstration that there is enough water quality storage and treatment. However, because of the addition of water quality storage and treatment . . . , the redevelopment of the site resulted in a net improvement in water quality storage and treatment."

Rule 40E-4.301(1)(e), Florida Administrative Code, provides that a proposed project will not adversely affect the quality of receiving waters such that water quality standards are violated. Section 1.3 of the BOR further provides that the District may consider alternative performance criteria in particular cases:

The criteria contained herein were established with the primary goal of meeting District water resource objectives as set forth in Chapter 373, F.S. Performance criteria are used where possible. Other methods of meeting overall objectives and which meet the conditions for issuance set forth in Rules 40E-4.301 and 40E-4.302 will be considered by staff or presented to the District Governing Board for consideration.

The District is often confronted with requests to redevelop older sites that pre-date its ERP program. Many of these sites are in urban and highly developed areas and have existing stormwater systems that need to be improved, but little or no space within which to achieve volumetric design standards. In such circumstances, the Agency must require alternative methods for onsite water quality treatment, such as requiring best management practices ("BMPs") or other measures beyond compliance with volumetric design standards. As a result, the District construes Rule 4.301(1)(e), and BOR sections 1.3 and 5.2.1(a), to allow it to approve ERP applications involving redevelopments provided there are reasonable assurances of net improvement to water quality treatment.

Here, it is undisputed that the redevelopment proposed by the Applicant results in a net improvement to water quality from the existing conditions at the site. The Applicant presented, and the District considered, alternative methods for preventing adverse impacts to water quality, such as the excess treatment capacity from the detention pond, the elimination of impervious surfaces, and the addition of filters to the site's stormwater drains (a type of BMP). Significantly, as provided in Special Condition No. 10 to the ERP, the permit contains "reopener" language requiring the District to impose additional measures should any adverse impacts occur. See TR at 89, Exhibit D-1 at 5.

Section 7.4. BOR Section 7.4 addresses the requirements for "wet detention." District staff and the Applicant correctly point out that the issue below involved only a proposal for dry detention. As such, section 7.4 is not applicable.

The issues raised in the proceeding exceptions fall within the District's substantive jurisdiction. For the reasons set forth herein, the Applicant's exception and District staff's Exception No. 2 are granted. Conclusion of Law No. 25 is modified to read as follows:

25. G5 met all of the requirements of the BOR.

Conclusion of Law No. 26 is modified to read as follows:

26. G5 and SFWMD contend that the ERP should issue, notwithstanding G5's failure to meet the BOR volumetric requirements for water quality storage and treatment, because G5's redevelopment results in a net improvement in water quality and, under rule 40E-4.301(1)(e), does not cause adverse effects on the quality of receiving waters such that the water quality standards are violated. The criteria flexibility contained in Section 1.3 of the BOR provides for the use of methods, other than the performance criteria set forth in the BOR, of meeting the overall objectives of Chapter 373, F.S. which meet the conditions for issuance set forth in Rules 40E-4.301 and 40E-4.302,

F.S. Because the redevelopment of the project will result in a net improvement in water quality storage and treatment, the overall objectives of Chapter 373, F. S. and the conditions for issuance will be met.

The Executive Director determines that these substituted conclusions of law are as or more reasonable than the ALJ's.

General Counsel's Correction to the Recommended Order

Although District staff and the Applicant point out that Section 7.4 of the BOR is not applicable to this case because dry detention is proposed rather than wet retention/detention (see discussion above), neither took exception to Conclusion of Law No. 22 in which the ALJ states that Section 7.4 applies to both wet and dry detention. As explained above, this is inaccurate, and, as result, Conclusion of Law No. 22 is deleted.

The subject of Conclusion of Law No. 22 falls squarely within the District's substantive jurisdiction. The Executive Director determines that this substituted conclusion of law is as or more reasonable than the ALJ's

CONCLUSION

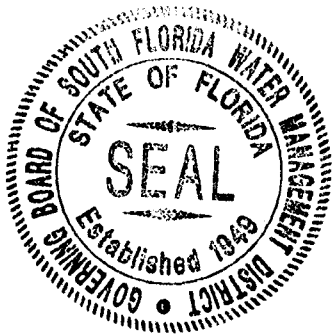
Having reviewed the Recommended Order, the exceptions and responses thereto, and considered the applicable law and being otherwise duly advised, it is **ORDERED** that:

- A. District staff's Exception No. 1 is denied for the reasons stated above.
- B. The Applicant's Exception and District staff's Exception No. 2 are granted for the reasons stated above and Conclusions of Law Nos. 25 and 26 are modified as set forth above.

- C. Conclusion of Law No. 22 is deleted for the reasons set forth above.
- D. The Recommended Order is adopted except as to Conclusions of Law Nos. 22, 25 and 26 and the ALJ's Recommendation. Conclusions of Law Nos. 22, 25 and 26 are modified as set forth above and the ALJ's Recommendation is rejected.
- E. Applications 080822-9 and 090721-8 are issued.
- F. A Notice of Rights is attached as Exhibit B.

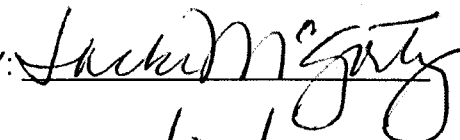
DONE and SO ORDERED, this 30 day of August, 2011 in West Palm Beach, Florida.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,
BY ITS EXECUTIVE DIRECTOR




Melissa Meeker

ATTEST:

BY: 

DATE: 8/30/2011

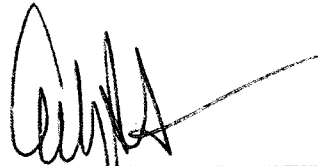
LEGAL FORM APPROVED:

BY: 

DATE: August 25, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been furnished this 30th day of August, 2011, by U.S. Regular Mail to the following distribution list:



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