

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DUKE'S STEAKHOUSE FT. MYERS,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 10-10443
)
G5 PROPERTIES, LLC, AND SOUTH)
FLORIDA WATER MANAGEMENT)
DISTRICT,)
)
Respondents.)
_____)

RECOMMENDED ORDER

On March 16, 2011, a final administrative hearing in this case was held in Fort Myers, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Margaret M. Craig, Esquire
Brickleyer Smolker & Bolves, P.A.
500 East Kennedy Boulevard, 2nd Floor
Tampa, Florida 33602-4936

For Respondent South Florida Water Management District:

Douglas H. MacLaughlin, Sr., Esquire
South Florida Water Management District
3301 Gun Club Road, Mail Stop Code 1410
West Palm Beach, Florida 33406-3007

For Respondent G5 Properties, LLC:

Matthew D. Uhle, Esquire
Law Office of Matthew D. Uhle, LLC
1617 Hendry Street, Suite 411
Fort Myers, Florida 33901-2926

STATEMENT OF THE ISSUE

The issue in this case is whether the South Florida Water Management District (SFWMD) should issue an Environmental Resource Permit (ERP) for the redevelopment of property owned by G5 Properties, LLC (G5).

PRELIMINARY STATEMENT

On March 13, 2009, SFWMD granted G5's Application 080822-9 and issued ERP 36-07074-P for the redevelopment of G5's property east of U.S. Highway 41 (a/k/a South Cleveland Avenue and South Tamiami Trail) and south of Sunrise Boulevard in Fort Myers. On September 14, 2009, SFWMD granted G5's Application 090721-8 and modified the ERP. After construction of the project, Duke's Steakhouse, Inc. (Duke's), which owns property south of G5's property, requested an administrative hearing, and SFWMD referred the request to DOAH under chapter 120, Florida Statutes.

At the final hearing, G5 called its stormwater engineer, Steven Darby, P.E., as an expert witness and had its Exhibits A1 through A7 admitted in evidence. SFWMD called Kenneth Kellum, P.E., an Engineer Supervisor, as an expert witness and had its

Exhibits D1, D2, D4, and D6 admitted in evidence. Petitioner called Andrew Harrow, its principal owner and chief executive officer, as a fact witness and Johnny Fletcher, a professional land surveyor, as an expert witness. Petitioner also had its Exhibits P1 through P4 admitted in evidence.

After presentation of evidence, G5 requested a transcript of the final hearing, and the parties filed proposed recommended orders, which have been considered.

FINDINGS OF FACT

1. The property owned by G5 east of U.S. 41 and south of Sunrise Boulevard in Fort Myers was developed as separate parcels by different owners in the 1970's and 1980's under the stormwater management regulations in effect at that time. Similarly, the Duke's property to the south was developed in that era under the same stormwater management regulations. The properties do not meet current ERP regulations.

2. G5 acquired the two parcels comprising its property with the intention of redeveloping it, primarily by constructing a two-story medical office building on what was the southern parcel. G5 applied to upgrade the surface water management system on the property, primarily by installing a detention pond on the southern parcel and directing surface water flow from a designated sub-basin on the southern parcel into the detention pond. The detention pond was to serve the dual purposes of

storage and water quality treatment. It was properly sized to store and treat the runoff from the sub-basin in a 25-year/3-day (the proper design) storm. Discharge from the detention pond was to be into the existing stormwater conveyance (an underground pipe) in the road right-of-way along the eastern property line (west of Austin Street). From there, water flows south into a drainage ditch to the south of the Duke's property. From there, water flows west to Whiskey Creek and eventually into the Caloosahatchee River. (The River is impaired; neither the Creek nor the River are designated as Outstanding Florida Water).

3. Although most of the redevelopment of G5's medical office building is on what was the southern parcel, and most of the stormwater falling on the southern parcel is directed into the detention pond, there is a covered portico entrance on the north side of the medical office building with a driveway that ramps up to the entrance from the west and ramps down away from the entrance to the east. The covered portico and ramped driveway extend onto what was the northern parcel. Some of the surface water runoff from the driveway flows to the west into the Florida Department of Transportation (DOT) swale in the U.S. 41 right-of-way, as it did before redevelopment; some of the surface water runoff from the driveway flows to the east and north, onto what was the northern parcel of G5's property.

Except for this runoff flow from the driveway, the drainage patterns on the northern parcel remain practically the same, the only differences being the replacement of a small amount of impervious surface with new impervious surface (pavement) and a small amount of impervious surface with pervious surface.

4. G5's redevelopment of its medical office building includes a driveway along the south side of the building, just north of the Duke's property, leading to parking on the south and east side of the building. Some of the surface water runoff from the entrance to the driveway flows to the west into the DOT swale in the U.S. 41 right-of-way, as it did before redevelopment.

5. G5's ERP does not provide for any storage or water quality treatment for runoff from the northern parcel, except for the addition of removable (for cleaning) filter inserts for the storm drains in that part of the property.

6. During the application process, G5 modified its proposal to deepen the detention pond. This was done to allow the redeveloper of the Taco Bell half a mile to the south of the Duke's property to take credit for additional storage and water quality treatment in order to get a Lee County permit for its project.

7. The Taco Bell also was developed under the old stormwater management regulations, but its redevelopment was

able to use a SFWMD "No Notice General Permit" because it impacted no wetlands, was less than ten acres, and had less than two acres of impervious surface. However, it needed a Lee County stormwater permit, which it could not get without additional water quality storage and treatment. Lee County allowed the Taco Bell redevelopment project to take credit for an increase in the depth of the detention pond at the G5 site and issued its permit.

8. Although Taco Bell got credit for water quality storage and treatment at the G5 property, no surface water runoff from the Taco Bell site actually reaches G5's detention pond, or even the Duke's property. It flows north through the pipe along Austin Street to the drainage ditch to the south of the Duke's property, and from there to Whiskey Creek and the Caloosahatchee River. However, the deeper detention pond would provide additional storage and water quality treatment for the G5 site for storms bigger than the design storm.

9. Petitioner's surveyor testified that there are up to four places along the property line between the G5 property and the Duke's property where topography indicates that some surface water runoff can flow from the G5 property across the property line to the Duke's property, post-redevelopment. His testimony was based on a comparison of spot elevations he took in the vicinity of the property line with elevations taken by other

surveyors. In addition, the surveyor could not say how much flow would occur in a 25-year, 3-day storm.

10. There was persuasive testimony from G5's engineer that the flow from one of the four locations identified by Petitioner's surveyor (in the southeast corner of the southern parcel of G5's property) existed pre-redevelopment. Contrary to Petitioner's argument, this testimony actually did not contradict other testimony of the engineer that all runoff from the new pavement on the southern parcel of the G5 property was intended to flow into the new detention pond. In that location in the southeast corner, G5's redevelopment project removed pavement, added 4-inch high curbing along the edge of the new pavement, and added grass between the curb and the property line (which would tend to reduce runoff onto the Duke's property).

11. Another location identified by Petitioner's surveyor was between the new office building and the property line. The surveyor related a water stain on the pavement and an exposed tree root ball to significant standing water and high flow conditions. Petitioner contends that this occurs because an asphalt overlay, four-tenths of a foot thick, was placed on top of the existing pavement in that area. To the contrary, G5's engineer testified that the surface water management system functions as it should and that the overlay did not change the grade but was "just to benefit the existing asphalt from

deteriorating any more." The water stain could be attributable at least in part to landscape irrigation, and the tree root may have been exposed mechanically. Even if the surveyor's testimony proved that there is some water flow in that area, he could not testify as to the quantity of flow.

12. Based on a preponderance of the evidence, G5 provided reasonable assurances that its surface water management system functions properly and that post-redevelopment runoff from the G5 property onto the Duke's property does not exceed pre-redevelopment conditions.

13. Petitioner cites significant standing water on the Duke's property after a heavy rain on January 26, 2011, as proof that the G5 redevelopment has caused flooding of the Duke's property. However, there was no standing water on the G5 property, and hardly any water in the detention pond. The standing water on Petitioner's property was above two storm drains on the western part of the Duke's property, which drain into the same pipe as the storm drains on the western side of the G5 property and the outfall structure discharging from the detention pond on the G5 property. The standing water on the Duke's property probably was caused by clogs in the drains in

the Duke's stormwater management system, not by G5's redevelopment.

14. Mr. Harrow claimed that the Duke's property was inspected when purchased, its stormwater management system was functioning properly, and it was properly maintained. But he also testified that maintenance ceased at some point and that it would require an engineer to correct what is wrong with it now, which Mr. Harrow believed to be cost-prohibitive and the responsibility of G5, not Petitioner.

15. Petitioner contends that no ERP should issue for G5's redevelopment project without the participation of Taco Bell in the operation and maintenance of the G5 detention pond. To the contrary, the Taco Bell permit might be deficient if Taco Bell has no control over the operation and maintenance of G5's detention pond, but there is no reason why Taco Bell has to participate in the operation and maintenance of G5's detention pond. By a preponderance of the evidence, G5 provided reasonable assurances that it has the legal and financial ability to operate and maintain its system, including the detention pond.

16. If a new development, G5's redevelopment project (which includes all 3.41 acres in the northern and southern parcels of the G5 property) 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 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.

CONCLUSIONS OF LAW

17. As the applicant, G5 has the burden to prove its entitlement to an ERP. See Fla. Dep't of Transp. v. J. W. C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). The standard of proof required to prove entitlement is a preponderance of the evidence. Id.

18. To obtain an ERP, G5 must provide reasonable assurances: that its redevelopment project will not cause adverse water quantity impacts to receiving waters and adjacent lands, adverse flooding to on-site or off-site property, adverse impacts to existing surface water storage and conveyance capabilities, adverse effects on the quality of receiving waters such that the water quality standards are violated, or adverse secondary impacts to the water resources; that the project will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed; and that it 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. See Fla. Admin. Code R. 40E-4.301(1)(a), (b), (c), (e), (f), (i), and (j). No other criteria for issuance under rule 40E-4.301 are applicable, and rule 40E-4.302 is not applicable.

19. The standards and criteria contained in the "Basis of Review for Environmental Resource Permit Applications Within the South Florida Water Management District" (BOR), incorporated by reference in rule 40E-4.091, determine whether the reasonable assurances required by subsection 40E-4.301(1) have been provided. See Fla. Admin. Code R. 40E-4.301(3).

20. BOR section 5.2.1(a) sets out the requirements for volumetric detention onsite for water quality purposes.

21. BOR section 6.2 limits the offsite runoff discharge rate during the design storm so as not to exceed historic rates. BOR section 6.3 defines the design storm as the 25-year, 3-day storm event.

22. BOR section 7.4 sets out the dimensional criteria for stormwater management system wet and dry detention areas.

23. BOR section 8.0 sets out design information and assumptions for various required calculations.

24. BOR section 9.0 sets out operating entity requirements.

25. G5 met all of the requirements of the BOR except for sections 5.2.1(a) and 7.4, which relate to water quality storage and treatment.

26. G5 and SFWMD contend that the ERP should issue, notwithstanding G5's failure to meet the BOR 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. However, neither G5 nor SFWMD cites any other authority for a so-called "net improvement" standard or exception from the requirements of the BOR that would apply in this case.

27. SFWMD contends that Petitioner has no standing to raise water quality issues. No question was raised as to Petitioner's standing to be a party to this case as a result of its flooding concerns.

28. In addition to administrative agencies (in this case, SFWMD) and "specifically named" persons whose substantial interests are determined in a proceeding (in this case, G5), section 120.52(13)(b), Florida Statutes, provides that the term "party" includes "[a]ny other person . . . whose substantial interests will be affected by proposed agency action"

29. For years, standing to be a party in a proceeding under section 120.57 was determined under the standard set out in Agrico Chem. Co. v. Dep't of Env'tl. Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981):

[B]efore one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Although Agrico was decided on the second prong of the test, its first prong also has been applied to make standing determinations.

30. More recent appellate decisions have clarified the first prong of the Agrico test. In order for a third party to have standing as a petitioner to challenge agency action in an administrative proceeding, the evidence must prove that the petitioner has substantial rights or interests that reasonably could be affected by the agency's action. See St. Johns Riverkeeper, Inc., et al. v. St. Johns River Water Mgmt. Dist., et al., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011); Palm Beach Cnty. Env'tl. Coal. v. Fla. Dep't of Env'tl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); Peace River/Manasota Reg'l Water

Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); Reily Enters., LLC v. Fla. Dep't of Env'tl. Prot., 990 So. 2d 1248, 1251 (Fla. 4th DCA 2008). See also § 403.412(5), Fla. Stat. ("A citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter.").

31. As the owner of property adjacent to G5's redevelopment project, Petitioner has substantial interests that could be affected by G5's ERP so as to enable Petitioner to contest G5's application and raise its issues regarding flooding.


32. The concept of "standing" relates to party status; it generally is not applied to limit the individual issues that can be raised by a party. SFWMD cites no authority for limiting the issues a party can raise in this case.

RECOMMENDATION

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

RECOMMENDED that SFWMD deny G5 an ERP for its redevelopment for failure to meet BOR requirements as to water quality storage and treatment.

DONE AND ENTERED this 25th day of May, 2011, 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
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of May, 2011.

COPIES FURNISHED:

Margaret M. Craig, Esquire
Bricklemyer Smolker & Bolves, P.A.
500 East Kennedy Boulevard, 2nd Floor
Tampa, Florida 33602-4936

Matthew D. Uhle, Esquire
Law Office of Matthew D. Uhle, LLC
1617 Hendry Street, Suite 411
Fort Myers, Florida 33901-2926

Douglas H. MacLaughlin, Sr., Esquire
South Florida Water Management District
3301 Gun Club Road, Mail Stop Code 1410
West Palm Beach, Florida 33406-3007

Tommy B. Strowd, Interim Executive Director
South Florida Water Management District
3301 Gun Club Road, Mail Stop Code 1410
West Palm Beach, Florida 33406-3007

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.