

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HIGHWAY 60 AND 301 CENTER,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 12-2021
)
BIG BEND CENTER, LLC,)
ENTERPRISE HOLDINGS, INC., AND)
SOUTHWEST FLORIDA WATER)
MANAGEMENT DISTRICT,)
)
Respondents.)
_____)

RECOMMENDED ORDER OF DISMISSAL

The final hearing in this case was held on January 24, 2013, by video teleconference at sites in Tallahassee and Tampa, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Joshua A. Harrow, Esquire
Suite 110
105 US Highway 301 South
Tampa, Florida 33619

For Respondent Big Bend Center, LLC:

Richard Gonzalez, pro se^{1/}
Big Bend Center, LLC
1706 South Kingsway Road
Seffner, Florida 33584

For Respondent Enterprise Holdings, Inc.:

Darryl R. Richards, Esquire
Katherine E. Cole, Esquire
Johnson, Pope, Bokor, Ruppel
and Burns, P.A.
403 East Madison Street, Suite 400
Tampa, Florida 33602

For Respondent Southwest Florida Water Management District:

Ronda L. Moore, Esquire
Southwest Florida Water Management
District
7601 U.S. Highway 301 North
Tampa, Florida 33637

STATEMENT OF THE ISSUES

The issues to be determined in this case are whether Petitioner Highway 60 and 301 Center, Inc., has standing to challenge the proposed Environmental Resource Permit issued to Respondent Big Bend Center, LLC, by Respondent Southwest Florida Water Management District ("District"), and, if so, whether Big Bend Center is entitled to issuance of the proposed permit.

PRELIMINARY STATEMENT

On January 11, 2012, the District issued Environmental Resource Permit 44003983.007 to Big Bend Center. Petitioner filed a petition for hearing to challenge the permit and the District referred the matter to DOAH to conduct an evidentiary hearing and issue a recommended order. The District subsequently approved two modifications to the permit, denoted by .008 and .009. Petitioner was twice granted leave to amend

its petition and the case proceeded as a challenge to the .009 modification.

Respondent Enterprise Holdings filed a motion to dismiss the petition for hearing on the basis that Petitioner lacked standing to challenge the permit. The motion was denied, but the case was bifurcated so that the issue of standing would be the sole issue to be addressed by the parties on January 24, 2013. Following the hearing on standing, the parties were provided an opportunity to submit the transcript of the hearing and proposed recommended orders on the issue of Petitioner's standing.

At the hearing, Petitioner presented the testimony of Clifford Laubstein, P.E., who was accepted as an expert in civil engineering. Petitioner Exhibits 1 and 2 were admitted into evidence. Enterprise Holdings presented the testimony of Steven Boggs, P.E., who was accepted as an expert in civil engineering. Enterprise Exhibits 12 and 13 were admitted into evidence. The District presented the testimony of Scott Hickerson, P.E., who was accepted as an expert in civil engineering. District Exhibits 2-4 were admitted into evidence. Big Bend presented no testimony or exhibits.

The one-volume Transcript of the hearing on standing was filed with DOAH and the parties submitted proposed recommended

orders that were carefully considered in the preparation of this Recommended Order of Dismissal.

FINDINGS OF FACT

The Parties

1. Petitioner owns real property located at 105 U.S. Highway 301 South, in Tampa, which Petitioner leases to commercial businesses.

2. Respondent Big Bend Center owns real property located at 110 U.S. Highway 301 South, which is across Highway 301 from Petitioner's property. Big Bend Center is named in the District's agency action and is the permittee.

3. The site affected by the proposed permit modification is about 2.5 acres in size. It is part of a larger development owned by Big Bend Center, encompassing about 30 acres.

4. The 30-acre site was the subject of a permit issued by the District in 1988. The 1988 permit approved a master drainage plan applicable to all 30 acres. The permit modifications discussed herein are modifications to this initial permit.

5. Respondent Enterprise Holdings leases the 2.5-acre site at 110 U.S. Highway 301 South, which Enterprise uses for the operation of a car and truck rental business.

6. When Petitioner filed its petition with the District, it named Enterprise Holdings, Inc., as a Respondent, even though

Enterprise Holdings was not named in the permit. Neither Petitioner nor the District ever questioned the right of Enterprise Holdings to participate as a party.

7. Respondent Southwest Florida Water Management District is the administrative agency charged with the responsibility to administer and enforce chapter 373, Florida Statutes, and the rules promulgated pursuant thereto in Florida Administrative Code Chapter 40D.

The Permit

8. The petition for hearing challenged the District's approval of a proposed permit designated 44003983.007. The permit authorized the construction of a building over existing pavement and the addition of a dumpster pad. After the petition for hearing was filed, Big Bend Center requested and the District approved a modification, designated .008, which included the .007 changes and, in addition, authorized the construction of a section of sidewalk and landscape islands in the parking lot. Enterprise then requested and the District approved another modification, .009, which authorized all the changes addressed in .008 and, in addition, authorized changes to the paved parking lot.

Standing

9. Petitioner contends that proposed permit, modification .009, would injure Petitioner because the authorized changes

would result in flooding of Highway 301 that could reach Petitioner's property or, even if it did not reach that far, would interfere with traffic on Highway 301 in a manner that would disrupt Petitioner's business.

10. The sole factual allegation upon which Petitioner bases its claim of flooding is that the previously-installed pipes that convey runoff to a retention pond may be too small; smaller than was required by Big Bend Center's 1988 permit. Petitioner's expert, Clifford Laubstein, stated that a boundary survey in the permit file shows two 18-inch diameter pipes connected to a 24-inch diameter pipe. Big Bend Center's 1988 permit required these pipes to be 24 inches and 30 inches, respectively.

11. Laubstein admitted that the "as built" construction drawings that were submitted to the District by Big Bend Center after the construction of the master drainage system certifies that the pipes are the required, larger size.

12. Laubstein did not have firsthand knowledge of the size of the pipes. He did not know which document was correct, the survey or the as built drawings. His position was simply that if the survey information was correct, Big Bend Center's stormwater system would fail to function properly and flooding could occur. Laubstein did not know whether the system had

failed to function properly in the past or had ever caused flooding.

13. Laubstein did not determine what storm event or volume of runoff would result in flooding of Highway 301, or the extent of flooding that would occur under various storm events.

14. Because as built constructions drawings are prepared by an engineer and submitted to the District for the very purpose of certifying that a system has been constructed in accordance with the requirements of the permit, information in the as built drawings about components of the system would generally be more reliable than such information in a survey that was prepared for another purpose.

15. Furthermore, Enterprise's expert witness, Steve Boggs, measured the pipes and determined they were 24 and 30 inches, as required by the permit.

16. By refuting Petitioner's claim that the pipes "may" be undersized, Respondents refuted Petitioner's claim that Highway 301 or Petitioner's property "may" be flooded if the proposed permit modification is issued by the District.

17. The stormwater system for the proposed project is properly sized to handle the stormwater runoff.

18. Petitioner failed to meet its burden to prove by a preponderance of the evidence that it could be injured by the proposed permit modification.

CONCLUSIONS OF LAW

19. A person or other entity not named in the agency action that is challenged cannot be forced to participate simply by being named in the petition as a respondent. An administrative hearing is not like a civil action where everyone sued by a plaintiff is thereby made a party-defendant. The better procedure in this case would have been for Enterprise Holdings to file a petition to intervene.

20. However, because Petitioner named Enterprise Holdings as Respondent and acquiesced in Enterprise Holdings' participation as a full party, any objection available to Petitioner on this point was waived. The Administrative Law Judge grants Enterprise Holdings the right to participate as Respondent.

21. In order to have standing to initiate a proceeding under section 120.57, Florida Statutes, Petitioner must show (1) it "will suffer injury in fact which is of sufficient immediacy to entitle him to a hearing," and, (2) that the "substantial injury is of a type or nature which the proceeding is designed to protect." Agrico Chem. Co. v. Dep't of Env'tl. Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

22. The injury or threat of injury must be real and immediate, not conjectural or hypothetical. Village Park Mobile

Homes Ass'n, Inc. v. State, Dep't of Bus. Reg., Div. of Fla.
Land Sales, 506 So. 2d 426, 433 (Fla. 1st DCA 1987).

23. Petitioner failed to demonstrate its standing because it failed to show a real and immediate threat of injury from the proposed permit modification.

RECOMMENDATION

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

RECOMMENDED that the District dismiss the petition and issue Environmental Resource Permit 44003983.009.

DONE AND ENTERED this 4th day of March, 2013, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of March, 2013.

ENDNOTE

1/ Did not appear at hearing.

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.