

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

CARL F. ZINN,)	
)	
Petitioner,)	
)	
v.)	DOAH CASE NO. 91-3862
)	
ST. JOHNS RIVER WATER)	SJRWMD FILE OF RECORD
MANAGEMENT DISTRICT and)	NO. 91-1041
GEORGE STRANGE,)	
)	
Respondents.)	
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FINAL ORDER

On November 4, 1991, the Hearing Officer from the Division of Administrative Hearings (DOAH) submitted his recommended order to the Executive Director of the St. Johns River Water Management District (District). On November 7, 1991, counsel for the District notified the parties of the opportunity and November 24, 1991, deadline for filing exceptions to the Hearing Officer's recommended order with the District. See attached Exhibit 2. No exceptions were filed. On December 10, 1991, this matter came before the Governing Board of the District for final agency action.

BACKGROUND

This matter was initiated by the timely filing of a petition for administrative hearing by Carl F. Zinn on February 15, 1991. The petition sought review of the District's proposed issuance of

a consumptive use permit to GJPS Lukas, Inc., authorizing irrigation of a 240-acre sod farm in Volusia County by withdrawing water from the Floridan aquifer via four wells and a pipeline ditch system. The application is for a new use. The issue in this proceeding is whether the proposed consumptive use of water meets the permitting requirements in Part II, Chapter 373, Florida Statutes (F.S.), and Chapter 40C-2, Florida Administrative Code (F.A.C.). The District has proposed to issue the permit with specified conditions which are part of the technical staff report for this application. See attached Exhibit 3. Mr. Zinn has challenged the issuance of this permit based on the Applicant's alleged failure to meet the criteria contained in Chapter 40C-2, F.A.C., and other applicable laws.

ORDER

WHEREFORE, having considered the recommended order submitted by the Hearing Officer, having reviewed the record of this proceeding, and being otherwise fully advised, it is hereby

ORDERED that the Hearing Officer's Recommended Order dated November 4, 1991, attached hereto as Exhibit 1, is adopted in its entirety as the final action of the Governing Board of the St. Johns River Water Management District, and it is further

ORDERED that GJPS Lukas, Inc.'s application for a consumptive use permit, no. 2-127-0808AN, is granted under the terms and conditions provided herein, excepting the requirement to use water

from the on-site surface water management system as the primary source of irrigation, and it is further

ORDERED that the petition of Carl F. Zinn is denied.

DONE AND ORDERED this 10th day of December 1991.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

12/11/91
DATE

BY: Joe E. Hill
JOE E. HILL
CHAIRMAN

RENDERED this 12th day of December 1991.

BY: Patricia C. Schultz
PATRICIA C. SCHULTZ
DISTRICT CLERK

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARL F. ZINN,)
)
 Petitioner,)
)
 v.) CASE NO. 91-3862
)
 GEORGE STRANGE and ST. JOHNS)
 RIVER WATER MANAGEMENT DISTRICT,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Notice was provided and on August 16, 1991, a formal hearing was held in this cause in accordance with Section 120.57(1), Florida Statutes. The location of the hearing was the Deland City Hall, Deland, Florida. Charles C. Adams served as the Hearing Officer.

APPEARANCES

For Petitioner: Clayton D. Simmons, Esquire
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Sanford, Florida 32772-4848

For Respondent Strange:

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996 Westwood Square, Suite 04
Oveido, Florida 32765

For Respondent St. Johns River Water Management District:

Eric T. Olsen, Esquire
St. Johns River Water Management
District
Post Office Box 1429
Palatka, Florida 32178-1429

STATEMENT OF ISSUES

The issue concerns the entitlement of GJPS Lukas, Inc. to be granted a consumptive use of water permit from the St. Johns River Water Management District. See Chapter 373, Florida Statutes, and Chapter 40C-2, Florida Administrative Code.

PRELIMINARY STATEMENT

Petitioner challenged the intent by the St. Johns River Water Management District (St. Johns) to grant a consumptive use of water permit to GJPS Lukas, Inc. in the person of George Strange (Applicant). The case was referred to the Division of Administrative Hearings for conduct of a formal hearing. That hearing took place on the date described.

At hearing the Applicant presented the testimony of George Strange. Two exhibits were admitted as presented by the Applicant. St. Johns presented Jack Caldwell Lawrence, Jr. as its witness together with its exhibits 1, 4 and 5 admitted. Petitioner testified and presented the testimony of James Caldwell Lawrence, Jr.

St. Johns moved for official recognition of Chapter 90, Florida Statutes; Part II Chapter 373, Florida Statutes; Chapter 40C-2, Florida Administrative Code, and the "Applicant's Handbook, Consumptive Uses of Water" as adopted by reference in Rule 40C-2.101, Florida Administrative Code. Official recognition was granted to those items.

A transcript was ordered and filed with the Division of Administrative Hearings on September 6, 1991, following which St. Johns filed its proposed recommended order on September 13, 1991. A misunderstanding occurred concerning the opportunity for Petitioner to submit a proposed recommended order after the transcript had been filed with the Division of Administrative Hearings. Petitioner then objected to consideration of the proposed recommended order filed by St. Johns or alternatively asked for additional time to submit a proposed recommended order by Petitioner. That motion was granted to the extent of allowing a proposed recommended order to be filed by Petitioner no later than October 23, 1991 upon condition that Petitioner not examine the contents of the proposed recommended order by St. Johns in preparing its proposed recommended order. The proposed recommended order of the Petitioner was filed on October 17, 1991. The Applicant did not submit a proposed recommended order. The proposed recommended orders by Petitioner and St. Johns have been considered and the suggested fact finding in those proposals is commented on in an appendix to this recommended order.

FINDINGS OF FACT

1. On December 7, 1990, the Applicant applied for a consumptive use of water permit under application no. 2-127-0808AN as submitted to St. Johns. The Applicant asked that it be allowed to withdraw water from the Floridian aquifer to irrigate a 240 acre sod farm by the use of four wells and a pipeline ditch irrigation system. This was a new use.

2. On January 9, 1991, St. Johns prepared a technical staff report recommending approval of the application. Petitioner was provided notice of this pending disposition on January 15, 1991 leading to his protest to the grant of the permit.

3. Petitioner's property is adjacent to the Applicant's property. Petitioner has a well which he uses for domestic water needs which is in the vicinity of the proposed project. He also has a commercial fish operation with a number of fish ponds including fresh water ponds. Both these uses may potentially be affected by the proposed consumptive water use contemplated by the Applicant.

4. St. Johns calculated that the irrigation of 240 acres of sod, by calculation using the modified Blaney-Criddle formula pertaining to evapotranspiration, calls for a maximum extraction of 169.4 million gallons a year. In any one month the amount withdrawn should not exceed 37.4 million gallons.

5. The Floridian aquifer at the place where the Applicant proposes to draw water is capable of the production of 169.4 million gallons of water per year and 37.4 million gallons per month without promoting environmental or economic harm. Extraction of this water for purposes of irrigation is an acceptable arrangement in that no wastewater treatment plants are within a five mile radius of the site of the proposed use. Therefore it would not be economically, technically or environmentally feasible for the Applicant to use reclaimed wastewater as a source for its irrigation needs.

6. The aquifer in that area is stable.

7. There was no showing in the hearing by competent evidence that saline water intrusion problems now exist in the area of the proposed site of withdrawal. There was no showing that the withdrawal of as much as 169.4 million gallons per year would cause a saline water intrusion problem.

8. The fields where the Applicant intends to apply the extracted water for irrigation purposes are surrounded by a system of ditches and water control structures to confine the water as applied to the sod and any mixing of that water with any surface or subsurface waters that are contributed by rain events. The ditches and control structures keep the water on the property and prevent flooding downgradient of the subject property. As a consequence flood damage on adjacent properties is not to be expected. On a related issue, the ditches and control structures will prevent water from discharging into receiving bodies of water and thereby degrading water in those receiving bodies such as the fish ponds operated by the Petitioner.

9. The water quality of the Floridian aquifer will not be harmed by the activities of the Applicant in withdrawing this water.

10. In the worse circumstances the well used by the Petitioner will be affected by the Applicant extracting the water from the aquifer to the extent of .25 to .4 drawdown in feet in the well the Petitioner uses. This is not a substantial impediment to the Petitioner's ability to withdraw needed water from the well he uses.

11. The Floridian aquifer in the area in question is semi-confined. The four wells that would be used in withdrawing water for the Applicant's purposes will extract the water at 110 feet below the surface. Between that level and the surface are three confining areas of clay totaling approximately 40 feet in thickness. Those confining units of clay would protect the water at the surface when the Applicant withdraws water and induces a gradient. In particular, the nature of the stratification in the soils in the area in question and the topography are such that the Petitioner's fish ponds, when taking into account the distance between the Applicant's operation and those fish ponds, the clay confining units and the gradient between the Applicant's property and the Petitioner's fish ponds, would not lead to a reduction in the water levels of the Petitioner's fish ponds when the water was extracted by the Applicant.

12. The proposed use by the Applicant would not require invading another use reserved by a permit issued from St. Johns.

13. St. Johns has not established minimum levels or rates of flow for the surface water in the area where the Applicant proposes to extract the water. Nor has St. Johns established a minimum level for a water table aquifer or a minimum potentiometric surface water for an aquifer in the area where the Applicant proposes to extract the water.

14. The surficial aquifer water table beneath the property where the Applicant intends to apply the extracted water should not be raised inordinately should the Applicant follow the best management practice as recommended as special condition No. 9 to the Consumptive Use Technical Staff Report pertaining to this project. Nonetheless if the water table beneath the Applicant's property were to be raised to a level which is too high or if the activities by the Applicant would result in excessive surface water runoff the ditches and water control structures that isolate the Applicant's property would prevent the water level in the Petitioner's fish pond from being increased by the Applicant's proposed activities. The application of the extracted water and the expected flow pattern of water applied to the surface and control of that water is set out in St. Johns' Exhibit No. 5 and described in the testimony of Jack Caldwell Lawrence, Jr., employee of St. Johns and an expert in geology and hydrology. See pages 61 and 62 of the transcript.

15. Concerning water quality in the Petitioner's fish pond, it will not be affected by the Applicant's proposed activities in extracting the water. The gradients and distances between the Petitioner's fish pond and the Applicant's fields do not allow surface water or water in the surficial aquifer, which is groundwater above the confining clay unit, to flow from the Applicant's fields into the Petitioner's fish ponds. Again the ditches and control structures related to the project offer additional protection against a compromise to the water quality in the Petitioner's fish ponds.

16. The Technical Staff Report on this project is an apt description of the project and the necessary conditions to granting a permit which would protect the public and environment. One modification has been made to that report and that modification is appropriate. It changes the intended disposition from one of allowing surface water from the onsite management system to be used as the primary irrigation supply with the Floridian aquifer serving as a supplementary source to one in which the Applicant would not use the onsite management system as a water supply source but would use the onsite management system simply as a discharge holding area.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action pursuant to Section 120.57(1), Florida Statutes.

18. Section 373.223(1), Florida Statutes, describes those requirements which must be satisfied before a consumptive use water permit may be granted to the Applicant wherein it says:

- (1) To obtain a permit pursuant to the provisions of this chapter, the applicant must establish that the proposed use of water:
 - (a) Is a reasonable-beneficial use as defined in s. 373.019(4);

- (b) Will not interfere with any presently existing legal use of water; and
- (c) Is consistent with the public interest.

19. The indication of what is meant by a reasonable beneficial use is defined at Section 373.019(4), Florida Statutes, to be:

- (4) "Reasonable-beneficial use" means the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest.

20. The definition of "reasonable beneficial use" is further defined in Parts I through III of the "Applicant's Handbook, Consumptive Uses of Water" as adopted by reference in Rule 40C-2.101, Florida Administrative Code. In particular Section 10.3 in Part II of that handbook defines "reasonable beneficial use" as follows:

- (a) The use must be in such quantity as is necessary for economic and efficient utilization. The quantity applied for must be within acceptable standards to the designated use (See Section 12.0 for standards used in evaluation of need/allocation).
- (b) The use must be for a purpose which is both reasonable and consistent with the public interest.
- (c) The source of the water must be capable of producing the requested amounts of water. This capability will be based upon records available to the District at the time of evaluation. An eight or ten year capability will be considered acceptable.
- (d) The environmental or economic harm caused by the consumptive use must be reduced to an acceptable amount. The methods for reducing harm include: reducing the amount of water withdrawn, modifying the method or schedule of withdrawal, or mitigating the damages caused (see also subsection 9.4.3 and 9.4.4 of this Handbook).
- (e) To the degree which is financially, environmentally, and socially practicable, available water conservation and reuse measures shall be used or proposed for use.
- (f) The consumptive use should not cause significant saline water intrusion or further aggravate currently existing saline water intrusion problems.
- (g) The consumptive use should not cause or contribute to flood damage.
- (h) The water quality of the source of the water should not be seriously harmed by the consumptive use.

(i) The water quality of the receiving body of water should not be seriously harmed by the consumptive use. A valid permit issued pursuant to Section 17-4.24 or Section 17-4.26, F.A.C., shall establish a presumption that this criterion has been met.

21. The Applicant has adequately addressed those requirements set forth in the conclusions of law with due regard for the general and special conditions contemplated by the Technical Staff Report and the conclusion that the Applicant will not interfere with presently existing legal uses of water and that the project is consistent with the public interest as contemplated by Section 9.2.2 and 9.3 respectively set out in the handbook.

RECOMMENDATION

Based upon the facts found and the conclusions of law reached, it is,

RECOMMENDED:

That a Final Order be entered which approves the application for consumptive use of water subject to the conditions set forth in the Technical Staff Report, excepting the need to have the Applicant utilize water from the onsite management system as the primary source of irrigation of its sod.

DONE and ENTERED this 4th day of November, 1991, in Tallahassee, Florida.

CHARLES C. ADAMS, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of November, 1991.

APPENDIX TO RECOMMENDED ORDER

The following discussion is made of the suggested facts set forth in the proposed recommended orders.

Petitioner's Facts

Paragraphs 1-6 are subordinate to facts found.

Concerning Paragraph 7, Petitioner does not have standing to take issue with the quality of notice provided to other adjacent landowners.

As to Paragraph 8, the witness had sufficient understanding of the location and nature of the surficial or sand aquifer and the clay confining units to have his testimony credited.

As to Paragraph 9 the fact that the witness is unaware of the exact depth of the Petitioner's fish pond does not cause his testimony to be disregarded in deciding that the fish ponds would not be negatively impacted by the activities contemplated in this permit application.

As to Paragraph 10, this proposed fact is inconsequential given the de novo nature of this proceeding.

As to Paragraph 11, see discussion of Paragraph 7.

As to Paragraph 12, it is rejected.

As to Paragraph 13, that knowledge was not necessary in determining the outcome here.

As to Paragraph 14, it is accepted in hypothetical terms, however, no showing was made that chlorides would increase in this instance and adversely affect the Petitioner's fish based upon the evidence adduced at hearing.

As to Paragraph 15, the soil samples from Petitioner's property are inclusive and less reliable than the description of soil in the general area as set forth by the witness for St. Johns.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.