

2002-09

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

**GLEN SPRINGS PRESERVATION
ASSOCIATION, INC., and
ELIZABETH T. FURLOW,**

Petitioners,

v.

**DOAH Case No. 01-3798
SJRWMD No. 2001-119**

**LUTHER E. BLAKE, JR.; IRENE
BLAKE CAUDLE; and ST. JOHNS
RIVER WATER MANAGEMENT
DISTRICT,**

Respondents.

FINAL ORDER

On February 14, 2002, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") rendered his RECOMMENDED ORDER in this matter. A copy of RECOMMENDED ORDER is attached as Exhibit "A".

STATEMENT OF THE ISSUE

The issue in this case is whether the application of Luther E. Blake, Jr. and Irene Blake Caudle, ("Applicants") for a stormwater permit should be approved pursuant to Chapter 373, Florida Statutes, and Chapter 40C-42, Florida Administrative Code ("F.A.C.").

In essence, Petitioners' MOTION TO SET ASIDE EXCLUSION OF THE EXCEPTIONS TO THE PROPOSED ORDER constitutes a request that Petitioners be allowed to file their Exceptions late. The motion, supported by an affidavit from Petitioners' attorney's legal assistant, sets forth facts showing that the attorney's filing instructions were susceptible of two interpretations, and that the wrong interpretation, filing at DOAH, was chosen by the legal assistant. At our regularly scheduled Governing Board meeting on March 12, 2002, we concluded that Petitioners' late-filed Exceptions should be considered as filed on time, with a filing date of March 11, 2002, based on the doctrine of "excusable neglect." That ruling was to be reflected in this Final Order. The District, joined by the Applicants, filed a timely response to PETITIONERS' EXCEPTIONS. This matter came before the Governing Board on April 9, 2002 for final agency action.

STANDARD OF REVIEW

The Governing Board's authority to act on a Recommended Order is set forth in section 120.57(1)(l), Florida Statutes. Upon receipt of an ALJ's recommended order, the Governing Board has essentially three alternatives: it may (1) adopt the recommended order as the agency's final order; (2) reject or modify findings of fact, but only if it determines from the record that the findings of fact were not based on competent substantial evidence; (3) reject or modify the conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. Under the latter two alternatives, the Governing Board issues a final

element and as to the legality and admissibility of that evidence. Scholastic Book Fairs v. Unemployment Appeals Commission, 671 So.2d 287, 289 (Fla. 5th DCA 1996). If competent substantial evidence supports a factual finding, the finding cannot be modified or rejected.

RULINGS ON THE PETITIONERS' EXCEPTIONS

Petitioners' EXCEPTIONS TO THE RECOMMENDED ORDER ("PETITIONERS' EXCEPTIONS") do not separately identify Petitioners' concerns as numbered exceptions. Instead, PETITIONERS' EXCEPTIONS discusses RECOMMENDED ORDER paragraph 28 under the heading "Standing of Glen Springs Preservation Association, Inc." and discusses five different RECOMMENDED ORDER paragraphs under the heading "Compliance with District Permitting Criteria." Significantly, Petitioners do not challenge any finding of fact on the ground that the finding is not based on competent substantial evidence. We will first address Petitioners' exception to paragraph 28, and then address, in sequential order, the exceptions to Recommended Order paragraphs 11, 13, 24, 33, and 35.¹

Exception Regarding Standing (conclusion of law paragraph 28).

The ALJ specifically found that "Respondents have not stipulated to Petitioners' standing." RECOMMENDED ORDER ¶4. He also concluded that Petitioners did not present the evidence necessary to prove the standing of Glen Springs

¹ PETITIONERS' EXCEPTIONS, under the heading "Compliance with District Permitting Criteria," discusses the Recommended Order paragraphs in the following sequence: 24, 33, 35, 13, and 11.

As discussed in the Standard of Review section, we cannot reject a finding of fact if it is supported by competent substantial evidence. The parties PREHEARING STIPULATION listed the Petitioners' standing as an issue for determination by the ALJ. See PREHEARING STIPULATION at ¶8(a). The PREHEARING STIPULATION, dated less than a week before the alleged oral agreement as to standing, provides competent substantial record evidence that Petitioners' standing was at issue. If a party wishes to rely on an off-the-record discussion, it is incumbent on the party's representative to make sure that the discussion is subsequently placed on the record.

Petitioners suggest that their answers to District's Interrogatories prove up the standing of Glen Springs Preservation Association (PETITIONERS' EXCEPTIONS ¶3). However, those answers were not introduced into evidence at the administrative hearing. Interrogatory answers that are not introduced into evidence are not part of the evidentiary record and cannot constitute competent substantial evidence to support a finding of fact. Coca-Cola Bottling Co. v. Clark, 299 So.2d 78, 82 (Fla. 1st DCA 1974) (written interrogatories "do not become a part of the evidence to be considered in resolving the trial issues unless properly offered and received into evidence"). Petitioners cannot now attempt to supplement the evidentiary record to show that the ALJ erred. "To allow a party to produce additional evidence after the conclusion of an administrative hearing below would set in motion a never-ending process of confrontation and cross-examination, rebuttal and surrebuttal evidence, a result not contemplated by the Administrative Procedures Act." Collier

requirement in subsection 40C-42.023(1).³ There are several reasons we must reject this exception.

First, the ALJ did not make a factual finding that a 25 year, 24 hour storm event will actually result in a discharge into Glen Springs Creek. Nor did he find that if there were to be such a discharge, that discharge would be greater than the pre-development discharge for a 25 year, 24 hour storm event. When reviewing a DOAH recommended order, we have no authority to make independent, supplementary findings of fact. *See, e.g., Manasota 88, Inc. v. Tremor*, 545 So.2d 439, 441 (Fla. 2d DCA 1989); *Friends of Children v. Dept. of H.R.S.*, 504 So.2d 1345, 1348 (Fla. 1st DCA 1987). Thus, we cannot make a finding that discharges from the proposed system to Glen Springs Creek will occur during a 25 year, 24 hour storm event.⁴ Second, even if we could make this supplemental finding, it would be irrelevant to the pending permit application, because the 25 year 24 hour storm event is not the benchmark to be used in determining compliance with subsection 40C-42.023(1).

³ Subsection 40C-42.023(1) contains requirements relating to water quality, water quantity (flooding), operation and maintenance, and possibly special basin criteria for projects located within the special basins identified in Chapter 40C-41, F.A.C. Petitioners' exception relates to the water quantity requirement (Petitioners' Exceptions ¶¶10-14).

⁴ Petitioners cite Dr. Fang's testimony (Vol. I at pp 132-33) as support for this asserted fact (PETITIONERS' EXCEPTIONS ¶12). Although, Dr. Fang testified that "[f]or Basin A, the 25 year, 24 hour total runoff volume exceeds the storage volume," he did not testify that discharges would reach Glen Springs Creek or that the post-development peak rate of discharge would exceed the pre-development peak rate of discharge for the 25 year, 24 hour storm.

¶14. The Petitioners did not take exception to this finding. Accordingly, the 25 year, 24 hour storm event is not relevant to the permit application at issue. In order to grant this exception, we would have to disregard existing subsection 40C-42.025(8) and substitute in its place a new permitting standard founded on the 25 year, 24 hour storm event. We cannot ignore our existing regulations. An agency is obligated to follow its own rules. Vantage Healthcare Corp. v. Agency for Health Care Admin., 687 So.2d 306, 308 (Fla. 1st DCA 1997).

Even if discharges from the proposed system to Glen Springs Creek will occur during large storm events, that fact would not cause Glen Springs Creek to become part of the system. Most systems discharge to a receiving waterbody during large storms. The relevant permitting question is whether offsite areas are proposed to be used to prevent the post-development peak rate of discharge from exceeding the pre-development peak rate of discharge during the 24-hour mean annual storm event. The ALJ'S finding that there will be no post-development discharge from the project site during the 24-hour mean annual storm means that Glen Springs Creek or other off-site areas will not be utilized to satisfy the requirement in subsection 40C-42.023(1).

For the forgoing reasons, Petitioners' request that we modify paragraph 11 is rejected.

Exception to Finding of Fact Paragraph 13

In RECOMMENDED ORDER paragraph 13, the ALJ states:

exceed the pre-development peak rate of discharge. Nevertheless, the District did analyze and present testimony regarding the 24-hour mean annual storm, the storm that would be analyzed if the proposed project were to have greater than 50% impervious surface. (Fang Vol. I at 73-75; Register Vol. II at 182-183, 205-206, 213-214, Applicants' Ex. 1-4, District's Ex. 4, Petitioners' Ex. 1A). Petitioners did not offer any evidence to the contrary. As found by the ALJ, after noting the project was less than 50% impervious,

[e]ven so, the Applicants demonstrated that the post-development peak rate of discharge from the project site will not exceed the pre-development peak rate of discharge for the 24-hour storm event. In fact, the post-development peak rate of discharge from the project site during the 24-hour mean annual storm event will be zero.

The evidence demonstrated that the proposed project meets the rule 40C-42.025(8) test regarding pre and post-development peak rates of discharge for the 24-hour mean annual storm event, even though that requirement did not apply to the proposed project. Thus, the very thing requested by Petitioners in their exception—that the project be analyzed under the rule 40C-42.025(8) 24-hour mean annual storm criteria—has occurred. For these reasons, the exception to paragraph 13 is denied.

Exception to Finding of Fact Paragraph 24

Petitioners take exception to RECOMMENDED ORDER paragraph 24 because the “applicant [sic] has not provided the required standard of proof” that the system

Carriers Ass'n, Inc. v. State, Dept. of Business & Professional Regulation, 738 So.2d 391, 394 (Fla. 3rd DCA 1999) ("reviewing agency may not reweigh the evidence, resolve the conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of the ALJ as the finder of the facts"); *see also* Heifetz v. Department of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1988) (agency cannot reweigh evidence in reviewing a recommended order). In light of the competent substantial evidence that supports the ALJ's finding and our inability to reweigh the testimony and other evidence, we cannot modify RECOMMENDED ORDER paragraph 24. Therefore, we must reject Petitioners' exception to that paragraph.

Exception to Conclusion of Law Paragraphs 33 and 35

Petitioners ask us to modify conclusion of law paragraphs 33 and 35 by rejecting the ALJ's conclusion that the applicants have shown by a preponderance of the evidence that they meet the applicable permitting criteria (PETITIONERS' EXCEPTIONS ¶¶ 8 and 9). Petitioners do not claim that the ALJ misapplied the law with regard to these two conclusions of law, and they provide no argument as to how the Applicants failed to meet their burden of proof. Petitioners merely ask us to reject the ALJ's conclusions. The findings of fact underlying those conclusions are supported by substantial competent evidence. As discussed above, we may not reweigh the evidence. Based on the underlying findings of fact, the Governing Board cannot reject the ALJ's conclusions of law. §120.57(1)(I), Florida Statutes. Consequently, Petitioners' exceptions to paragraphs 33 and 35 are denied.

NOTICE OF RIGHTS

Any party to this order has the right to seek judicial review of the order pursuant to section 120.68, F.S., by the filing of a Notice of Appeal under Rule 9.110 of the Florida Rules of Appellate Procedure with the District Clerk, 4049 Reid Street, Palatka, Florida, 32177, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal and each party to this order. The Notice of Appeal must be filed within 30 days after this order is rendered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this ____ day of April, 2002, by U.S. Mail to SAMUEL A. MUTCH, ESQ., Mutch & Brigham, P.A., 2114 NW 40th Terrace, Suite A-1, Gainesville, Florida 32605 and RONALD A. CARPENTER, ESQ., Carpenter & Parrish, P.A., 5608 NW 43rd Street, Gainesville, Florida 32653 and by hand delivery to CHARLES A. LOBDELL, III, and JENNIFER B. SPRINGFIELD, St. Johns River Water Management District, Post Office Box 1429, Palatka FL 32178-1429.

William H. Congdon
Deputy General Counsel



STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLEN SPRINGS PRESERVATION)	
ASSOCIATION, INC., and)	
ELIZABETH T. FURLOW,)	
)	
Petitioners,)	
)	
vs.)	Case No. 01-3798
)	
LUTHER E. BLAKE, JR.; IRENE)	
BLAKE CAUDLE; and ST. JOHNS)	
RIVER WATER MANAGEMENT)	
DISTRICT,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on January 3 and 4, 2002, in Gainesville, Florida.

APPEARANCES

For Petitioners:	Samuel A. Mutch, Esquire Mutch & Brigham, P.A. 2114 Northwest 40th Terrace, Suite A-1 Gainesville, Florida 32605-3592
For Respondents: (Applicants)	Ronald A. Carpenter, Esquire Carpenter & Parrish, P.A. 5608 Northwest 43rd Street Gainesville, Florida 32653-8334

For Respondent: Charles A. Lobdell, III, Esquire
(District) Jennifer B. Springfield, Esquire
St. Johns River Water Management District
Post Office Box 1429
Palatka, Florida 32178-1429

STATEMENT OF THE ISSUE

The issue is whether an Environmental Resource Permit should be issued to Luther E. Blake, Jr. and Irene Blake Caudle authorizing the construction of a stormwater management system to serve a single-family development known as Walnut Creek, Phases I and II, in Gainesville, Florida.

PRELIMINARY STATEMENT

This matter began on August 15, 2001, when Respondent, St. Johns River Water Management District, issued its Written Notice of Intended District Decision on Permit Application 42-001-71000-1 authorizing Respondents, Luther E. Blake, Jr. and Irene Blake Caudle, to construct a stormwater management system for a single-family residential subdivision in Gainesville, Florida. On September 7, 2001, Petitioners, Glen Springs Preservation Association, Inc., and Elizabeth T. Furlow, filed a Petition for Administrative Hearing challenging the issuance of the permit. The matter was referred to the Division of Administrative Hearings on September 26, 2001, with a request that an Administrative Law Judge be assigned to conduct a hearing.

By Notice of Hearing dated October 12, 2001, a final hearing was scheduled on January 3 and 4, 2002, in Gainesville, Florida.

Petitioners' Motion to Continue the hearing was denied by Order dated December 20, 2001. A second Motion to Continue filed by Petitioners at the outset of the hearing was also denied.

At the final hearing, Petitioners presented the testimony of Dr. Leonard T. Furlow, Jr.; Dr. W. Herbert Platt; Dr. John D. Dame; Bonnie O'Brien; Dr. Merrill Wilcox; William R. Reck, a professional engineer accepted as an expert; and Stephen Boyes, a hydrogeologist accepted as an expert. Also, they offered Petitioners' Exhibits 1, 1A, 2, 25, and 26, which were received in evidence. Respondent, St. Johns River Water Management District, presented the testimony of Dr. Chou Fang, a professional engineer accepted as an expert, and Michael A. Register, III, director of the Division of Water Resources accepted as an expert. Also, it offered District Exhibits 1-5, 8, and 10, which were received in evidence. Respondents, Luther E. Blake, Jr. and Irene Blake Caudle, presented the testimony of H. Jerome Kelley, a professional engineer accepted as an expert, and M. Fred Rwebyogo, a professional engineer accepted as an expert. Also, they offered Applicants' Exhibits 1-5 and 7-9, which were received in evidence. Finally, the undersigned took official recognition of the St. Johns River Water Management District Applicant's Handbook: Regulation of Stormwater Management Systems and Chapter 40C-42, Florida Administrative Code.

The Transcript of the hearing (four volumes) was filed on January 23, 2002. Proposed Findings of Fact and Conclusions of Law were filed by Petitioners and by the St. Johns River Water Management District on February 4, 2002, and they have been considered by the undersigned in the preparation of this Recommended Order.¹

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

a. Background

1. In this environmental permitting dispute, Respondent, St. Johns River Water Management District (District), proposes to issue an Environmental Resource Permit to Respondents, Luther E. Blake, Jr. and Irene Blake Caudle (Applicants), authorizing the construction of a stormwater management system to serve Phases I and II of a single-family development known as Walnut Creek Subdivision in Gainesville, Florida.

2. The system will be located on a 31-acre, L-shaped parcel of undeveloped, forested land. The proposed system includes a 135-lot single family subdivision, internal roadways with curb and gutter, a storm sewer system, and five dry retention ponds. The project site is located west of Northwest 13th Street (Highway 441) in the northwestern portion of the City of Gainesville between Northwest 39th Avenue (State Road 222) and Northwest 31st

Boulevard, west of Palm Grove Subdivision, and east of Hidden Pines Subdivision.

3. Petitioner, Glen Springs Preservation Association, Inc. (Association), is a corporation made up of an undisclosed number of persons, at least one of whom resides adjacent to or near the proposed project site. Petitioner, Elizabeth T. Furlow (Furlow), who did not indicate that she is a member, also resides with her husband near the project site. As set forth in the parties' Prehearing Stipulation, Petitioners contend that the proposed system fails to meet certain design and performance criteria, that the Applicants have failed to submit the appropriate documentation to satisfy the operation and maintenance entity requirements, and that the Applicants have failed to provide reasonable assurance that the system meets the general requirements for issuance of a permit. More specifically, they contend that the requirements of Rules 40C-42.023(1)(a)-(c), 40C-42.025(1), (3), (4), (5), (6), (7), (8), and (10), 40C-42.026(1)(a), (c), and (d), and 40C-42.027, Florida Administrative Code, have not been met.² On these technical issues, the parties have presented conflicting expert testimony, and the undersigned has accepted the more credible and persuasive testimony, as set forth in the findings below.

4. Respondents have not stipulated to Petitioners' standing. Through the testimony of Furlow's husband, it was established that the Furlows live just south of the project site, approximately 100

yards north of Northwest 31st Boulevard near a creek known as Glen Springs Creek (Creek). The Furlows fear that if a permit is issued, runoff from the project site will cause further erosion of the Creek's banks and flooding during rainfall events.

5. Although three persons who live adjacent to or near the project site appeared as witnesses, only one (Bonnie O'Brien) indicated that she is a member of the Association. Ms. O'Brien has lived just west of the Creek since 1969, around one-half mile from the project site. Over the years, and due to erosion caused by increasing development in the area, much of which began before the District began permitting stormwater systems, the Creek's banks have increased in depth from around a foot or so to as much as six feet. During large storm events, the Creek's waters rise up to as much as five feet in depth. Like the Furlows, Ms. O'Brien fears that runoff from the project will go into the Creek and adversely affect her property. There was, however, no evidence concerning the Association's interests, whether the Association is a Florida corporation, the number of members in the Association, and except for Ms. O'Brien, whether any of its members are substantially affected by the proposed activity.³

b. Design and performance criteria

6. The Applicants propose to use a dry retention system consisting of five dry retention ponds ranging in depth from three to four and one-quarter feet which will be located mainly along

the western boundaries of the project site. In general terms, stormwater runoff from the residential lots will sheet flow to roadways and alleys, will be collected by curbs and gutters, and then will be conveyed to the five ponds for water quality treatment.

7. Rule 40C-42.025(1) requires that "[e]rosion and sediment control best management practices shall be used as necessary during construction to retain sediment on-site." The more persuasive evidence shows that the applicants have done so, and that the best management practices used by the Applicants are generally utilized throughout the development community. Therefore, the requirements of this rule have been met.

8. Rule 40C-42.025(3) provides that unless applicable local regulations are more restrictive, "[n]ormally dry basins designed to impound more than two feet of water or permanently wet basins shall be fenced or otherwise restricted from public access." The proposed retention basins that have three-to-one (horizontal: vertical) side slopes will be fenced to prevent public access. The evidence also shows that there are no applicable, more restrictive local regulations.

9. Under Rule 40C-42.025(4), "[a]ll stormwater basin side slopes shall be stabilized by either vegetation or other materials to minimize erosion and sedimentation of the basins." As to this requirement, the evidence establishes that all of the stormwater

basin side slopes will be stabilized by vegetation to minimize erosion and sedimentation of the basins, as required by the rule. Further, the proposed retention basin side slopes are four-to-one and three-to-one. Slopes of this dimension are typically stable and will not easily erode.

10. Rule 40C-42.025(5) requires that the systems be designed so that they "accommodate maintenance equipment access" and "facilitate regular operational maintenance." The evidence shows that the Applicants own the entire project site, and each of the five retention ponds can be accessed from roads and alleys within the project site.

11. Rule 40C-42.025(6) requires that an applicant "obtain sufficient legal authorization as appropriate prior to permit issuance for stormwater management systems which propose to utilize offsite areas to satisfy the requirement in subsection 40C-42.023(1), F.A.C." Because the Applicants are not proposing to use any offsite areas for the system, and the system is located entirely on the project site, no "legal authorization" from other persons is required.

12. Under Rule 40C-42.025(7), the system "shall provide gravity or pumped discharge that effectively operates under . . . [m]aximum stage in the receiving water resulting from the mean annual 24-hour storm." Calculations performed by the Applicants, and verified by the District's independent calculations, show that

the system is designed to retain all of the runoff from the mean annual 24-hour storm event. Therefore, this rule has been satisfied.

13. Rule 40C-42.025(8) provides that if a system serves a new construction area with greater than 50 percent impervious surface, an applicant is required to demonstrate that "post-development peak rate of discharge does not exceed the pre-development peak rate of discharge" for the mean annual 24-hour storm event. If the system serves a new construction area with less than 50 percent impervious surface, however, the requirements of this rule do not apply.

14. The evidence shows that the proposed retention system will serve a new construction area (around 12 acres) with less than 50 percent impervious area. Therefore, the rule does not apply. Even so, the Applicants demonstrated that the post-development peak rate of discharge from the project site will not exceed the pre-development peak rate of discharge for the 24-hour storm event. In fact, the post-development peak rate of discharge from the project site during the 24-hour mean annual storm event will be zero.

15. Finally, Rule 40C-42.025(10) requires in part that the construction plans and supporting calculations be "signed, sealed, and dated by an appropriate registered professional." The evidence shows that the final set of plans submitted in January

2002 by the Applicants was signed and sealed by H. Jerome Kelly, a professional engineer.⁴

c. Specific design and performance criteria

16. Rule 40C-40.026(1)(a) requires that the retention system provide retention of stormwater runoff in one of four ways. Here, the Applicants have designed the system to provide "[o]n-line retention of an additional one half inch of runoff from the drainage area over the volume specified in subparagraph 1. above." Subparagraph 1. requires "[o]ff-line retention of the first one half of runoff or 1.25 inches of runoff from the impervious area, whichever is greater[.]" Because the system will provide on-line retention of a minimum of one inch of runoff from the project area, plus 1.25 inches of runoff from the impervious soil in the project/drainage area, it is found that the capacity of the proposed retention system is more than adequate to capture the quantity of stormwater runoff required by this rule.

17. Under Rule 40C-42.026(1)(c), the system must be designed to "[p]rovide the capacity for the appropriate treatment volume of stormwater specified in paragraphs (a) and (c) above, within 72 hours following the storm event assuming average antecedent moisture conditions." To assure compliance with this rule, and to demonstrate that the system meets the required recovery of the water quality treatment volume, the District performed modeling to predict the vertical infiltration rate and the groundwater

mounding effects of the proposed retention system. For the reasons stated below, it is found that the system will provide the required amount of treatment volume capacity within 72 hours of a storm event assuming average antecedent moisture conditions, as required by the rule.

18. The District used one of the latest versions of the MODRET computer modeling program, a methodology routinely used by the District to support an application for this type of retention system. That program takes into account vertical percolation into the soil; once the water reaches the water table, the model then takes into account the lateral or horizontal movement of the water out of the pond. The model is used to determine whether the required water quality treatment volume, which is significantly less than the storage volume in the ponds, will draw down within three days. The modeling confirmed that this requirement will be satisfied. Data from the Applicants' on-site soil survey was used in the model to establish the depth below ground surface of the seasonal high water table level. This resulted in a conservative assumption of an above-normal average antecedent moisture condition beneath the retention ponds.

19. The Applicants also collected soil samples from the project site, including those areas where the retention ponds will be located, and they performed laboratory tests in accordance with ASTM D2434 to calculate the vertical hydraulic conductivity and

the horizontal hydraulic conductivity for those soils. The results of both tests fall within accepted ranges as stated in the published soils texts and governmental soils surveys for the project area.

20. In addition, the Applicants conducted an independent test to determine the mean seasonal high water table on the project site. Based on visual observations of the soil samples, the Applicants determined that the mean seasonal high water table is between six and seven feet below ground surface. The visual observation of the soil samples is compatible with the results of Petitioners' soil augers obtained off the project site.

21. As noted earlier, the proposed retention ponds will have a depth of three to four and one-quarter feet, which places the bottom of the ponds above the mean high water table as determined by the Applicants' calculations and as stated in the soils survey for Alachua County. Therefore, the dry retention ponds should not be considered impervious surfaces.

22. Finally, Rule 40C-42.026(1)(d) requires that the retention system "[b]e stabilized with pervious material or permanent vegetation cover." The evidence shows that the proposed retention system will be stabilized with permanent vegetative cover.

d. Other requirements and concerns

23. Runoff from other developed properties in the vicinity of the proposed project site discharges into the Creek, contributing to erosion in the Creek. Not all of these existing developments have stormwater management systems on-site, since some of the older properties were built before the District assumed regulation over this activity.

24. The proposed system can be effectively operated and maintained without causing or exacerbating the erosion problems that currently exist within the Creek system. This is because once the system is built, the amount of runoff leaving the site will be less than what is now present in the pre-development state. Thus, the project, as now designed, will not adversely affect drainage and flood protection on adjacent or nearby properties.

25. Through the submission of a copy of the Articles of Incorporation and Declaration of Covenants for the Walnut Creek Homeowner's Association, the Applicants demonstrated that the District's requirements regarding the operation and maintenance of the proposed system after completion of construction will be met, as required by Rule 40C-42.027(4).

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2001).

27. As the applicants in this cause, Luther E. Blake, Jr., and Irene Blake Candle bear the burden of showing by a preponderance of the evidence that they are entitled to the requested permit. See, e.g., Cordes v. State, Dep't of Envir. Reg., 582 So. 2d 652, 654 (Fla. 1st DCA 1991).

28. In order for an association to demonstrate standing, it must show that a "substantial number of its members, although not necessarily a majority, are 'substantially affected' by the challenged [action]"; that "the subject matter of the [proposed agency action is] within that association's general scope of interest and activity"; and that the "relief requested must be of the type appropriate for a[n] . . . association to receive on behalf of its members." Fla. Home Builders Ass'n v. Dep't of Labor and Employ. Sec., 412 So. 2d 351, 353-54 (Fla. 1982). Except for the testimony of one member, and the impact of the project on her property, there was no evidence regarding the number of members of the Association, whether a substantial number of the members are substantially affected by the District's intended action, the Association's general scope of interest and activity, and whether the requested relief is of a type

appropriate for an association to receive on behalf of its members. This being so, the Association has failed to demonstrate standing to challenge the proposed agency action.

29. As to Ms. Furlow, through the testimony of her husband, she has demonstrated that she will be substantially affected by the proposed agency action, and therefore she has standing to bring this action.

30. Rule 40C-42.023, Florida Administrative Code, sets forth the general requirements for issuance of a permit for a stormwater management system. The relevant requirements are as follows:

(1) To receive a general or individual permit under this chapter the applicant must provide reasonable assurance based on plans, test results and other information, that the stormwater management system:

(a) Will not result in discharges from the system to surface and ground water of the state that cause or contribute to violations of state water quality standards as set forth in chapters 62-302, 62-4, 62-550, F.A.C, including any antidegradation provisions of sections 62-4.242(1)(a) and (b), 62-4.242(2) and (3), and 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in sections 62-4.242(2) and (3), F.A.C.;

(b) Will not adversely affect drainage and flood protection on adjacent or nearby properties not owned or controlled by the applicant; [and]

(c) Will be capable of being effectively operated and maintained pursuant to the requirements of this chapter[.]

Petitioners contend that the Applicants have failed to give reasonable assurance that these requirements have been met.

31. In addition, Chapter 40C-42, Florida Administrative Code, governs stormwater management systems of the type proposed by the Applicants. Of relevance here are Rules 40C-42.025 and 40C-42.026, Florida Administrative Code, which set forth design and performance criteria and specific design and performance criteria, respectively, which apply to stormwater management systems. As reflected in the parties' Prehearing Stipulation, Petitioners contend that eight design and performance criteria (subsections (1), (3)-(8), and (10)) and three specific design and performance criteria (paragraphs (1)(a), (c), and (d)) have not been satisfied.

32. Finally, Rule 40C-42.027(4), Florida Administrative Code, requires that the owner or developer must submit documentation to demonstrate that the responsible entity (in this case, a homeowners' association) meets the operation and maintenance entity requirements.

33. By a preponderance of the evidence, the Applicants have established that the system complies with all design and performance criteria, including those concerning erosion and sediment control, fencing, side slope stabilization, maintenance access, tailwater condition, and the signing and sealing of the construction plans. The evidence also shows that Subsections (6) and (8) do not apply. This is because the Applicants do not propose to use any offsite areas to satisfy the requirements of

Rule 40C-42.023(1), and the proposed system will not serve a new construction area with greater than a 50 percent impervious surface.

34. By a preponderance of the evidence, the Applicants have also shown that the system complies with all specific design and performance criteria, including the ability to retain the required water quality treatment volume and to recover its capacity within 72 hours of a rainfall event. Further, the system will be stabilized with permanent vegetative cover.

35. The preponderance of the evidence shows that the requirements of Rule 40C-42.023(1)(a)-(c) have been met, and that reasonable assurance has been given by the Applicants for issuance of a permit. Likewise, the more persuasive evidence shows that the requirements of Rule 40C-42.027 have also been met. This being so, the permit should be issued.

RECOMMENDATION

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

RECOMMENDED that the St. Johns River Water Management District enter a final order granting application number 42-001-71000-1 of Luther E. Blake, Jr. and Irene Blake Caudle for an Environmental Resource Permit.

DONE AND ENTERED this 14th day of February, 2002, in
Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of February, 2002.

ENDNOTES

1/ Respondents, Luther E. Blake and Claudia Blake Caudle, have adopted by reference the Proposed Recommended Order submitted by the District.

2/ In their Proposed Recommended Order, Petitioners now concede that the requirements of Rules 40C-42.025(1), (4), and (5), 40C-42.026(1)(d), and 40C-42.027 have been met.

3/ Although the initial Petition contains allegations concerning these matters, there was no supporting proof.

4/ The rule simply contemplates that the plans be signed and sealed by a licensed professional. The fact that the plans may contain an erroneous calculation, as Petitioners suggest, does not render the sealing invalid.

COPIES FURNISHED:

Kirby B. Green, III, Executive Director
St. Johns River Water Management District
Post Office Box 1429
Palatka, Florida 32178-1429

Samuel A. Mutch, Esquire
Mutch & Brigham, P.A.
2114 Northwest 40th Terrace, Suite A-1
Tallahassee, Florida 32605-3592

Charles A. Lobdell, III, Esquire
St. Johns River Water Management District
Post Office Box 1429
Palatka, Florida 32178-1429

Ronald A. Carpenter, Esquire
Carpenter & Parrish, P.A.
5608 Northwest 43rd Street
Gainesville, Florida 32653-3332

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.