

STATE OF FLORIDA
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

GREENSPACE PRESERVATION
ASSOCIATION, INC., ET AL,

DOAH CASE NO. 97-002845
97-002846
SJRWMD FOR NO. 97-1769

Petitioners,

vs.

CITY OF GAINESVILLE AND ST. JOHNS
WATER MANAGEMENT DISTRICT,

Respondents.

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings (DOAH), by its duly designated administrative law judge, the Honorable Donald R. Alexander, held a formal administrative hearing in the above-styled case on October 20 and 21, and November 6, 1997, in Gainesville, Florida.

A. APPEARANCES

For Petitioners, GREENSPACE PRESERVATION ASSOCIATION, INC.; FRANK WARD; SAL LOCASCIO; FREDERICK P. PETERKIN; AND HAROLD M. STAHLER.:

Samuel A. Mutch, Esquire
2790 Northwest 43rd Street
Suite 100, Meridien Centre
Gainesville, Florida 32606

For Respondent, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT
(District staff):

Jennifer B. Springfield, Esquire
Mary Jane Angelo, Esquire
St. Johns River Water Management District
Post Office Box 1429
Palatka, FL 32178-1429

For Respondent, CITY OF GAINESVILLE. (the City):

Richard R. Whiddon, Jr., Esquire
Post Office Box 1110
Gainesville, FL 32602-1110

On December 19, 1997, Judge Alexander submitted to the St. Johns River Water Management District, and all other parties to this proceeding, a Recommended Order, a copy of which is attached hereto as Exhibit "A." District staff filed exceptions to the Recommended Order. This matter then came before the Governing Board on January 14, 1996, for final agency action.

B. STATEMENT OF THE ISSUE

The issue in this case is whether the City's applications for an individual stormwater permit and a noticed general environmental resource permit for Phase 1A of the proposed Hogtown Creek Greenway should be approved.

C. RULINGS ON EXCEPTIONS

RESPONDENT DISTRICT STAFF'S EXCEPTIONS

1. Exception 1

District staff take exception to conclusion of law 60 and assert that the Administrative Law Judge's conclusion the City provided reasonable assurances that its

notice general permit application meets the requirements of Rule 40C-400.475(2), Florida Administrative Code (F.A.C.), is not complete in that the Judge should have also cited Rule 40C-400.475(1), F.A.C. The Governing Board may reject or modify conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. §120.57(1)(j), Fla. Stat. (1997). Rule 40C-400.475(1), F.A.C., sets forth certain size thresholds which a project must be below to qualify for this noticed general environmental resource permit. A project must both be below these size thresholds and meet the conditions of Rule 40C-400.475(2), F.A.C., to be authorized by this noticed general environmental resource permit.

In this case, the Administrative Law Judge found that the activity for which this noticed general environmental resource permit is sought involves piling supported structures. (Finding of Fact 39) The Administrative Law Judge found that the total area of the proposed bridge and boardwalk over surface waters or wetlands is approximately 481 square feet. (Finding of Fact 41). The Administrative Law Judge determined that the affected waters, Hogtown and Possum Creeks are designated Class III waters. (Finding of Fact 41). Since the City's application for this noticed general environmental resource permit involves piling supported structures of less than 1,000 square feet over wetlands or other surface waters, which are not designated Outstanding Florida Waters, District staff's exception number one is accepted, and Conclusion of Law 60 is modified to read that the District's requirements applicable to the City's noticed general environmental resource permit application are found in Rule 40C-400.475(1) and (2), F.A.C., and that the City has provided reasonable assurances that the project meets these requirements.

2. Exception 2

In its exception 2, District staff takes exception to the Administrative Hearing Officer's ultimate recommendation of approving the subject applications. District staff asserts that in his recommendation, the Administrative Hearing Officer did not set forth the relevant conditions which are to be a part of the recommended permits. District staff asserts that these conditions were implicitly accepted by the Administrative Law Judge in making his recommendation.

As to the application for the stormwater permit, we note that Rule 40C-42.032, F.A.C., provides that, unless waived or modified by the Board, certain limiting conditions are placed on every permit issued by the District under Chapter 40C-42, F.A.C. These conditions are set forth in Rule 40C-43.032(2)(a), F.A.C. These same conditions are set forth in District staff's Exhibit 3A which was admitted. (See Preliminary Statement portion of Recommended Order) The record does not indicate that any party objected to these conditions, or that the Administrative Law Judge otherwise thought they should be changed or waived. No party has objected to the District staff's exception on this point. Thus, District staff's Exception 2 is accepted as to the standard conditions in Rule 40C-43.032(2)(a), F.A.C., and these standard conditions shall be a part of the City's stormwater permit.

District staff's Exception 2 also asserts that Special ERP conditions 1, 7, 8, 9, and 28, and Other Conditions 1, 2, and 3, should be attached to the stormwater permit. Special ERP conditions 1, 7, 8, 9, and 28 were set forth in District staff's Exhibit 3B which was admitted. (See Preliminary Statement portion of Recommended Order). Other conditions

1 and 2 were set forth in the City's Exhibit 19 (consisting of the District staff's technical staff report for the stormwater permit) which was admitted. Other condition 3 was set forth in District staff's Exhibit 4 which was admitted. The record does not indicate that any party objected to any of these conditions. Moreover, the Administrative Law Judge's findings of fact reflect the requirements of these conditions. For example, other condition number 3 is referred to in Finding of Fact 17, special condition 7 is referred to in Finding of Fact 24, and the monthly sinkhole monitoring requirements of special condition 8 is reflected in Finding of Fact 33. Thus, it appears the Administrative Law Judge assumed the application of these special conditions in determining that reasonable assurances were provided. Therefore, District staff's Exception 2 is accepted on this point, and these conditions shall be a part of the City's stormwater permit.

As to the application for the noticed general permit, Rule 40C-400.215, F.A.C., requires several standard conditions, set forth in that rule, to be applied to all noticed general environmental resource permits. This conditions were also set forth in the City's Exhibit 20 which was admitted. There is nothing in the record or the Administrative Law Judge's Findings of fact that indicates that these conditions should not be applied to this noticed general environmental resource permit. Therefore, District staff's Exception 2 is accepted on this point, and the conditions of Rule 40C-400.215, F.A.C., shall be a part of the City's noticed general environmental resource permit.

ACCORDINGLY, IT IS HEREBY ORDERED:

The Recommended Order dated December 19, 1997, attached hereto as Exhibit A, is adopted in its entirety except as modified by the final action of the Governing Board of

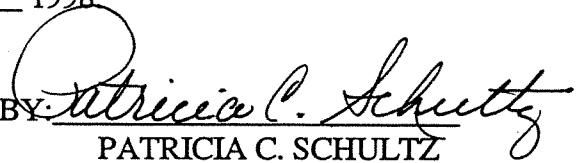
the St. Johns River Water Management District (rulings on District staff's Exceptions 1 and 2). The City of Gainesvilles' applications numbered 42-001-0789AIG-ERP and 400-001-0309AIG-ERP for a stormwater environmental resource permit and noticed general environmental resource permit, respectively, are hereby granted under the terms and conditions provided herein.

DONE AND ORDERED this 14th day of January 1998, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: 
DAN ROACH
CHAIRMAN

RENDERED this 15th day of January 1998

BY: 
PATRICIA C. SCHULTZ
DISTRICT CLERK

copies to:

DONALD R. ALEXANDER, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550;

Jennifer B. Springfield, Esquire
Mary Jane Angelo
St. Johns River Water management District
Post Office Box 1429
Palatka, FL 32178-1429

Samuel A. Mutch, Esquire
2790 Northwest 43rd Street
Suite 100, Meridien Centre
Gainesville, Florida 32606

Richard R. Whiddon, Jr., Esquire
Post Office Box 1110
Gainesville, FL 32602-1110

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within 90 days of rendering of the final District action.

2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.App. 9.110 within 30 days of the rendering of the final District action.

3. A party to the proceeding who claims that a District order is inconsistent with the provisions and purposes of Chapter 373, Florida Statutes, may seek review of the order pursuant to Section 373.114, Florida Statutes, by the Land and Water Adjudicatory Commission (Commission) by filing a request for review with the Commission and serving a copy on the Department of Environmental Protection and any person named in the order within 20 days of adoption of a rule or the rendering of the District order.

4. A District action or order is considered "rendered" after it is signed by the Chairman of the Governing Board on behalf of the District and is filed by the District Clerk.

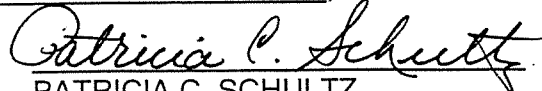
5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 or #2 or for Commission review as described in paragraph #3 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been furnished by United States Mail to:

SAMUEL A MUTCH, ESQ
2790 NORTHWEST 43RD STREET
SUITE 100 MERIDIEN CENTRE
GAINESVILLE FL 32606

At 4:00 P.M. this 15TH day of JANUARY, 1998.



PATRICIA C. SCHULTZ
DISTRICT CLERK

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

CERTIFIED MAIL # Z229-564-524

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within 90 days of rendering of the final District action.
2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.App. 9.110 within 30 days of the rendering of the final District action.
3. A party to the proceeding who claims that a District order is inconsistent with the provisions and purposes of Chapter 373, Florida Statutes, may seek review of the order pursuant to Section 373.114, Florida Statutes, by the Land and Water Adjudicatory Commission (Commission) by filing a request for review with the Commission and serving a copy on the Department of Environmental Protection and any person named in the order within 20 days of adoption of a rule or the rendering of the District order.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been
furnished by United States Mail to:

RICHARD R WHIDDON, JR. ESQ
PO BOX 1110
GAINESVILLE FL 32602-1110

At 4:00 P.M. this 15TH day of JANUARY, 1998.



PATRICIA C. SCHULTZ
DISTRICT CLERK

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

CERTIFIED MAIL # Z229-564-525

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within ~~90 days of rendering of~~ the final District action.

2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.App. 9.110 within 30 days of the rendering of the final District action.

3. A party to the proceeding who claims that a District order is inconsistent with the provisions and purposes of Chapter 373, Florida Statutes, may seek review of the order pursuant to Section 373.114, Florida Statutes, by the Land and Water Adjudicatory Commission (Commission) by filing a request for review with the Commission and serving a copy on the Department of Environmental Protection and any person named in the order within 20 days of adoption of a rule or the rendering of the District order.

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5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 or #2 or for Commission review as described in paragraph #3 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been furnished by United States Mail to:

DONALD R ALEXANDER, HEARING OFFICER
DIVISION OF ADMINISTRATIVE HEARINGS
THE DESOTO BUILDING
1230 APALACHEE PARKWAY
TALLAHASSEE FL 32399-1550

At 4:00 P.M. this 15TH day of JANUARY, 1998.


PATRICIA C. SCHULTZ
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

CERTIFIED MAIL # P337-543-238

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

| | | |
|----------------------------|---|-------------------|
| GREENSPACE PRESERVATION |) | |
| ASSOCIATION, INC.; FRANK |) | |
| WARD; SAL LOCASCIO; |) | |
| FREDERICK P. PETERKIN; and |) | |
| HAROLD M. STAHMER, |) | |
| |) | |
| Petitioners, |) | |
| |) | |
| vs. |) | Case Nos. 97-2845 |
| |) | 97-2846 |
| ST. JOHNS RIVER WATER |) | |
| MANAGEMENT DISTRICT and |) | |
| CITY OF GAINESVILLE, |) | |
| |) | |
| Respondents. |) | |
| |) | |

RECOMMENDED ORDER

Pursuant to notice, this matter was heard on October 20 and 21, and November 6, 1997, in Gainesville, Florida, by Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

| | |
|-------------------------------|--|
| For Petitioners: | Samuel A. Mutch, Esquire 2790 Northwest 43rd Street Suite 100, Meridien Centre Gainesville, Florida 32606 |
| For Respondent: (District) | Jennifer B. Springfield, Esquire Mary Jane Angelo, Esquire Post Office Box 1429 Palatka, Florida 32178-1429 |
| For Respondent: (City) | Richard R. Whiddon, Jr., Esquire Post Office Box 1110 Gainesville, Florida 32602-1110 |

STATEMENT OF THE ISSUE

The issue is whether the City's applications for an individual stormwater permit and a noticed general environmental

resource permit for Phase 1A of the proposed Hogtown Creek Greenway should be approved.

PRELIMINARY STATEMENT

Case No. 97-2845 began in May 1997 when Respondent, St. Johns River Water Management District, issued its notice of intent to issue an individual stormwater permit to Respondent, City of Gainesville, authorizing the construction of a 2,000 foot long asphaltic trail/boardwalk, a parking facility, and associated improvements related to Phase 1A of the Hogtown Creek Greenway project in the City of Gainesville. Case No. 97-2846 involves the proposed issuance of a noticed general environmental resource permit to the City of Gainesville to construct 481 square feet of piling supported structures over wetlands or surface waters for the same project.

On June 9, 1997, Petitioners, Greenspace Preservation Association, Inc., Frank Ward, Sal Locascio, Frederick P. Peterkin, Harold M. Stahmer and Jane B. Conner, filed Petitions for Initiation of Formal Proceedings with the St. Johns River Water Management District seeking to contest the issuance of the two permits.

The cases were referred by the agency to the Division of Administrative Hearings on June 13, 1997, with a request that an Administrative Law Judge be assigned to conduct a final hearing.

By Notice of Hearing dated July 2, 1997, the two cases were consolidated and a final hearing was scheduled on October 1 and 2, 1997, in Gainesville, Florida. Petitioners' Motion to Reschedule was granted, and the hearing was continued to October

20 and 21, 1997, at the same location. At Petitioners' request, the cases were again rescheduled to October 21 and 22, 1997.

On June 30, 1997, Respondents filed Motions to Strike certain portions of the petitions. ~~The motions~~ were granted by order dated August 2, 1997, and Petitioners were required to file amended petitions reflecting the changes required by the order. Thereafter, on September 19 and 24, 1997, Petitioners filed a First Amended Petition for Initiation of Formal Proceedings in Case No. 96-2845 and a Second Amended Petition for Initiation of Formal Proceedings in Case No. 96-2846. On October 13, 1997, the undersigned granted a Motion to Strike paragraph (e)(3) on pages 4 and 5 of the Second Amended Petition.

At final hearing, Jane B. Conner was removed as a party due to ill health. The remaining Petitioners presented the testimony of Thomas L. Morris, accepted as an expert in biology and impacts of construction projects on the biota of North Florida; Dr. David L. Auth, accepted as an expert in zoology and herpetology in the State of Florida; Dr. Daniel B. Ward, accepted as an expert in botany; and Charles Swallows, a professional engineer and accepted as an expert in civil engineering. Also, they offered Petitioners' Exhibits 1-6. All exhibits except number 2 were received in evidence. Respondent St. Johns River Water Management District presented the testimony of Timothy Segul, accepted as an expert in water resource engineering; Barbara Hatchitt, accepted as an expert in wetlands ecology, wetlands delineation, and environmental resource permitting; Patrick M. Frost, accepted as an expert in wetlands ecology and water

managment permitting; and Rory Causseaux. Also, it offered District Exhibits 1, 2, 3A and B, 4, 5A-D, 6 and 8. All exhibits were received in evidence. The City presented the testimony of Rory Causseaux, a professional engineer and accepted as an expert in civil engineering; Larry Sellers, accepted as an expert in wetland delineation; Wayne Bowers; Theresa Scott; Deanna Kinnard; and Timothy Sagul. Also, it offered City Exhibits 1-26. All exhibits were received. Finally, the undersigned took official recognition of Chapters 40C-1, 40C-41, 40C-42, 40C-400, 62-302, 62-340, 62-520, and 62-550, Florida Administrative Code; the St. Johns River Water Management District's Applicants Handbook: Regulation of Stormwater Management Systems, Chapter 40C-42, Florida Administative Code, dated October 3, 1995; Rules 39-27.003, 39-27.004, 39-27.005, and 40C-4.021, Florida Administrative Code; and 50 Code of Federal Regulations, Section 17.12.

The transcript of hearing (five volumes) was filed on November 13, 1997. Proposed findings of fact and conclusions of law were due no later than December 1, 1997. They were timely filed by Respondents, and they have been considered by the undersigned in the preparation of this Recommended Order.

On December 15, 1997, or two weeks after the designated due date, Petitioners filed proposed findings of fact and conclusions of law. That proposed order is the subject of a Motion to Strike filed by the agency.

FINDINGS OF FACT

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

A. Background

1. In these two cases, Respondent, City of Gainesville (City), seeks the issuance of a stormwater system management permit (stormwater permit) to construct a 2,000-foot long asphaltic trail/boardwalk, a parking facility and associated improvements for Phase 1A of the Hogtown Creek Greenway project in the north central portion of the City. That matter is docketed as Case No. 97-2845. The City also seeks the issuance of a noticed general environmental resource permit (NGP) to construct 481 square feet of piling supported structures over wetlands or surface waters for the same project. That matter has been assigned Case No. 97-2846. Respondent, St. Johns River Water Management District (District), is the regulatory agency charged with the responsibility of reviewing and approving the requested permits.

2. Petitioner, Greenspace Preservation Association, Inc., is a not-for-profit Florida corporation primarily composed of persons who own real property adjacent to the route proposed by the City, as well as local environmental interests. Petitioners, Frank Ward, Sal Locascio, Frederick P. Peterkin, and Harold M. Stahmer, are individuals who own real property adjacent to the route proposed by the City for the Greenway. The parties have stipulated that Petitioners are substantially affected by the District's proposed action and thus have standing to initiate

these cases.

3. On March 28, 1997, the City filed applications for a stormwater permit and a NPG for Phase IA of the Hogtown Creek Greenway project. After conducting a review of the applications, including an on-site visit to the area, in May 1997, the District proposed to issue the requested permits.

4. On June 9, 1997, Petitioners timely filed a Petition for Initiation of Formal Proceedings as to both intended actions. As amended and then refined by stipulation, Petitioners generally allege that, as to the stormwater permit, the City has failed to provide reasonable assurance that the project meets the permitting requirements of the District; the City has failed to provide reasonable assurance that the stormwater system will not cause violations of state water quality standards; the City has failed to provide reasonable assurance that the project satisfies the District's minimum required design features; and the City has failed to provide reasonable assurance that the stormwater system is capable of being effectively operated and maintained by the City.

5. As to the NPG, Petitioners generally allege that the piling supported structure is not less than 1,000 square feet; the jurisdictional wetlands are greater than the area shown on the plans submitted by the City; the City has failed to provide reasonable assurance that the system will not significantly impede navigation; the City has failed to provide reasonable assurance that the system does not violate state water quality standards; the City has failed to provide reasonable assurance

that the system does not impede the conveyance of a watercourse in a manner that would affect off-site flooding; the City has failed to provide reasonable assurance that the system will not cause drainage of wetlands; and the City failed to provide reasonable assurance that the system does not adversely impact aquatic or wetland dependent listed species.

6. Respondents deny each of the allegations and aver that all requirements for issuance of the permits have been met. In addition, the City has requested attorney's fees and costs under Section 120.595(1)(b), Florida Statutes (Supp. 1996), on the theory that these actions were filed for an improper purpose.

B. A General Description of the Project

7. The Hogtown Creek Greenway is a long-term project that will eventually run from Northwest 39th Street southward some seven miles to the Kanapaha Lake/Haile Sink in southwest Gainesville. These cases involve only Phase 1A of that project, which extends approximately one-half mile. This phase consists of the construction of a 2,000-foot long asphaltic concrete trail/boardwalk, a timber bridge and boardwalk, a parking facility, and associated improvements. The trail will extend from the Loblolly Environmental Facility located at Northwest 34th Street and Northwest 5th Avenue, to the intersection of Northwest 8th Avenue and Northwest 31st Drive.

8. The trail will have a typical width of ten feet. For the majority of its length, the trail will be constructed of asphaltic concrete overlying a limerock base, and it will generally lie at the existing grade and slope away from the

creek.

9. Besides the trail, additional work involves the repaving of Northwest 5th Avenue with the addition of a curb and gutter, the construction of an entrance driveway, paved and grassed parking areas, and sidewalks at the Loblolly Environmental Facility, and the widening and addition of a new turn lane and pedestrian crosswalk at the intersection of Northwest 8th Avenue and Northwest 31st Drive.

C. The Stormwater Permit

a. Generally

10. The entire Phase IA project area lies within the Hogtown Creek 10-year floodplain. It also lies within the Hogtown Creek Hydrologic Basin, which basin includes approximately 21 square miles. The project area for the proposed stormwater permit is 4.42 acres.

b. Water quality criteria

11. Phase IA of the Greenway will not result in discharges into surface groundwater that cause or contribute to violations of state water quality standards.

12. When a project meets the applicable design criteria under the District's stormwater rule, there is a presumption that the project will not cause a violation of state water quality standards. There are two dry retention basins associated with the project. Basin 1 is located at the cul-de-sac of Northwest 5th Avenue and will capture and retain the stormwater runoff from the new and reconstructed impervious areas at the Loblolly Facility. Basin 2 is located at the parking area and will

capture and retain stormwater runoff at the existing building and proposed grass parking area.

13. Under the stormwater rule, the presumptive criteria for retention basins require that the run-off percolate out of the basin bottom within 72 hours. The calculations performed by the City's engineer show that the two retention basins will recover within that timeframe. In making these calculations, the engineer used the appropriate percolation rate of ten inches per hour. Even using the worst case scenario with a safety factor of twenty and a percolation rate of one-half inch per hour, the two retention basins will still recover within 72 hours.

14. The presumptive criteria for retention basins require that the basin store a volume equal to one inch of run-off over the drainage area or 1.25 inches of run-off over the impervious area plus one-half inch of run-off over the drainage area. The calculations performed by the City's engineer show that the two retention basins meet the District's volume requirements for retention systems.

15. An applicant is not required to utilize the presumptive design criteria, but instead may use an alternative design if the applicant can show, based on calculations, tests, or other information, that the alternative design will not cause a violation of state water quality standards. As a general rule, the District applies its stormwater rule so that water quality treatment is not required for projects or portions of projects that do not increase pollutant loadings. This includes linear bicycle/pedestrian trails. The City's proposed trail will not be

a source of pollutants.

16. The City will install signs at both entrances to the trail to keep out motorized vehicles. Except for emergency and maintenance vehicles, motorized vehicles will not be permitted on the trail. The infrequent use by emergency or maintenance vehicles will not be sufficient to create water quality concerns. The construction of a treatment system to treat the stormwater from the trail would provide little benefit and would only serve to unnecessarily impact natural areas.

17. Although treatment of the stormwater run-off from the trail portion of the project is not required under District rules, the run-off will receive treatment in the vegetated upland buffer adjacent to the trail. The District's proposed other condition number 3 will require the City to plant vegetation in unvegetated and disturbed areas in the buffer. This will reduce the likelihood of erosion or sedimentation problems in the area of the trail. Although disputed at hearing, it is found that the City's engineer used the appropriate Manning coefficient in the calculations regarding the buffer. Even without a vegetated buffer, run-off coming from the bicycle trail will not violate state water quality standards.

18. The City will install appropriate erosion and sediment controls. These include siltation barriers along the entire length of both sides of the proposed trail prior to commencing construction. Such barriers will not allow silt or other material to flow through, over, or under them.

19. The City will also place hay bales and any other silt fencing necessary to solve any erosion problem that may occur during construction. In addition, the permit will require an inspection and ~~any necessary~~ repairs to the siltation barriers at the end of each day of construction.

20. Saturation of the limerock bed under the paved portion of the trail is not expected to cause a problem because heavy vehicles will not regularly use the trail. The trail portion of the project can be adequately maintained to avoid deterioration.

c. Sensitive Karst Areas Basin criteria

21. The two proposed dry retention basins for Phase 1A are located within the District's Sensitive Karst Areas Basin. They include all of the minimum design features required by the District to assure adequate treatment of the stormwater before it enters the Floridan aquifer and to preclude the formation of solution pipe sinkholes in the stormwater system.

22. There will be a minimum of three feet of unconsolidated soil material between the surface of the limestone bedrock and the bottom and sides of the two retention basins. The appropriate mechanism for determining the depth of limestone is to do soil borings. The soil borings performed by the City show that there is at least three feet of unconsolidated material between the bottom of the basins and any limerock where the borings were taken. In other words, limestone would not be expected to be within three feet of the bottom of either basin. Based on the soil boring results, the seasonal high water table is at least six feet below ground level.

23. The depth of the two retention basins will be less than ten feet. Indeed, the depth of the basins will be as shallow as possible and will have a horizontal bottom with no deep spots. To make the retention basins any larger would require clearing more land. A large shallow basin with a horizontal bottom results in a lower hydraulic head and therefore is less potential for a sinkhole to form. Before entering the basins, stormwater will sheet flow across pavement and into a grass swale, thereby providing some dispersion of the volume.

24. Finally, the two retention basin side slopes will be vegetated. Special condition number 7 provides that if limestone is encountered during excavation of a basin, the City must over-excavate the basin and backfill with three feet of unconsolidated material below the bottom of the basin.

d. Drainage and flood protection

25. Contrary to Petitioners' assertions, the project will not adversely affect drainage or flood protection on surrounding properties.

26. The trail will be constructed generally at existing grade. Because the trail will be constructed at existing grade, the net volume of fill necessary for Phase 1A is approximately zero. Therefore, there will not be a measurable increase in the amount of runoff leaving the site after construction, and the trail will not result in an increase in off-site discharges.

27. District rules require that the proposed post-development peak rate of discharge from a site not exceed the pre-development peak rate of discharge for the mean annual storm

only for projects that exceed fifty percent impervious surface.

The proposed project has less than fifty percent impervious surface. Even though it is not required, the City has

demonstrated that the post-development rate of discharge will not exceed the pre-development peak rate of discharge.

28. Both basins will retain the entire mean annual storm so that the post-development rate of discharge is zero. Even during a 100-year storm event, the retention basins will not discharge. Therefore, there will not be any increase in floodplain elevations during the 10, 25, or 100-year storm events from the proposed project.

e. Operation and maintenance entity requirements

29. The applicable requirements of Chapter 40C-42, Florida Administrative Code, regarding operation and maintenance, have been met by the applicant.

30. The City proposes itself as the permanent operation and maintenance entity for the project. This is permissible under District regulations. The duration for the operation and maintenance phase of the permit is perpetual.

31. The City has adequate resources and staff to maintain the phase 1A portion of the project. The public works department will maintain the stormwater management system out of the City's utility fund.

32. The City provides periodic inspections of all of its stormwater systems. These inspections are paid for out of the collected stormwater fees. The City will also conduct periodic inspections of the project area, and the two retention basins

will be easily accessed by maintenance vehicles.

33. The City will be required to submit an as-built certification, signed and sealed by a professional engineer, once the project is constructed. Monthly inspections of the system must be conducted looking for any sinkholes or solution cavities that may be forming in the basins. If any are observed, the City is required to notify the District and repair the cavity or sinkhole.

34. Once the system is constructed, the City will be required to submit an inspection report biannually notifying the District that the system is operating and functioning in accordance with the permitted design. If the system is not functioning properly, the applicant must remediate the system.

35. The City will be required to maintain the two retention basins by mowing the side slopes, repairing any erosion on the side slopes, and removing sediment that accumulates in the basins. Mowing will be done at least six times per year. The City will stabilize the slopes and bottom areas of the basins to prevent erosion.

36. The City has a regular maintenance schedule for stormwater facilities. The project will be included within the City's regular maintenance program.

37. The City has budgeted approximately \$80,000.00 for maintenance of the trail and vegetated buffer. Also, it has added new positions in its budget that will be used to maintain and manage the Greenway system.

38. Finally, City staff will conduct daily inspections of the Phase 1A trail looking for problems with the vegetated buffer, erosion problems along the trail, and sediment and debris in the retention basin. If the inspections reveal any problems, the staff will take immediate action to correct them.

D. The Noticed General Environmental Resource Permit

a. Generally

39. By this application, the City seeks to construct 481 square feet of piling supported structures over wetlands or surface waters. The proposed structures include a 265 square foot timber bridge over an un-vegetated flow channel, which connects a borrow area to Possum Creek, and a 216 square foot boardwalk over two small wetland areas located south of the flow channel. None of the pilings for the bridge or boardwalk will be in wetlands, and no construction will take place in Hogtown or Possum Creeks. The paved portion of the trail will not go through wetlands, and there will be no dredging or filling in wetlands.

40. The receiving waters for the project are Hogtown and Possum Creeks. Both are Class III waters. Hogtown Creek originates in north central Gainesville and flows southwest to Kanapaha Lake/Haile Sink in southwest Gainesville. Possum Creek originates in northwest Gainesville and flows southeast to its confluence with Hogtown Creek south of the proposed bridge structure.

b. Wetlands

41. The total area of the proposed bridge and boardwalk over surface water or wetlands is approximately 481 square feet. The wetland delineation shown on the City's Exhibit 5A includes all of the areas in the project area considered to be wetlands under the state wetland delineation methodology.

42. The United State Army Corps of Engineers' wetland line includes more wetlands than the District wetland line. The former wetland line was used to determine the area of boardwalk and bridge over wetlands. Even using this line, however, the total area of boardwalk over surface waters or wetlands is approximately 481 square feet and is therefore less than 1,000 square feet.

c. Navigation

43. The proposed system does not significantly impede navigation. Further, the structures will span a wetland area and an un-vegetated flow channel, both of which are non-navigable. In fact, the flow channel generally exhibits little or no flow except after periods of rainfall.

d. Water quality

44. The construction material that will be used for the bridge and boardwalk will not generate any pollutants. Moreover, chemical cleaners will not be used on those structures.

45. Silt fences will be used and vegetation will be planted in the vicinity of the bridge and boardwalk to prevent erosion and sedimentation problems. The amount of erosion from drip that comes off the boardwalk will be minimal. Therefore, the bridge

and boardwalk will not cause a violation of state water quality standards.

e. Off-site flooding

46. The project will not impede conveyance of any stream, river, or other water course which would increase off-site flooding.

47. The structures will completely span the wetland areas and flow channel, and no part of the structures, including the pilings, will lie within any water or wetland areas including the flow channel. There will be a span of 2.5 to 3 feet from the horizontal members of the bridge and boardwalk down to the ground surface which will allow water to pass through unobstructed. Further, there will not be any cross ties or horizontal obstructions on the lower portions of the boardwalk or bridge pilings. Further, due to the spacing of the pilings, the boardwalk and bridge will not trap sufficient sediment such as leaves to impede the conveyance of the flow channel. Therefore, conveyance through the flow channel will not be affected by the structures.

48. Because the boardwalk and bridge are not over Hogtown or Possum Creeks, they will not cause any obstruction to the conveyance of the creeks.

f. Aquatic and wetland dependent listed species

49. The project will not adversely affect any aquatic or wetland dependent listed species. These species are defined by District rule as aquatic or wetland dependent species listed in Chapter 39-27, Florida Administrative Code, or 50 Code of Federal

50. No such species are known to exist in the project area, and none are expected to exist in the location and habitat type of the project area. Therefore, contrary to Petitioners' assertions, there are no listed salamander, frog, turtle, or lizard species known to occur within the Hogtown Creek basin.

51. Although it is possible that the box turtle may be found in the project area, it is not an aquatic or wetland dependent listed species.

52. One baby American alligator (between two and three feet in length) was observed in the borrow pit area of the project on September 11, 1997. Except for this sighting, no other listed animal species have been observed in the project area. As to the alligator, the only area in which it could nest would be in the existing excavated borrow pit, and none of the proposed construction will take place in that area. More than likely, the alligator had walked into the area from Clear Lake, Kanapaha Prairie, or Lake Alice. The proposed structures will not affect the movement of the alligator nor its feeding habits.

g. Drainage of wetlands

53. Because the boardwalk and bridge are elevated structures over waters and wetlands, and the City has not proposed to construct ditches or other drainage systems, the proposed system will not cause drainage of the wetlands.

h. Coral/macro-marine algae/grassbeds

54. The proposed system is not located in, on, or over coral communities, macro/marine algae, or a submerged grassbed

community.

D. Were the Petitions Filed for an Improper Purpose?

55. Prior to the filing of their petitions, Petitioners did not consult with experts, and they prepared no scientific investigations. Their experts were not retained until just prior to hearing.

56. Petitioners are citizens who have genuine concerns with the project. They are mainly longtime residents of the area who fear that the Greenway will not be properly maintained by the City; it will increase flooding in the area; it will cause water quality violations; and it will attract thousands of persons who will have unimpeded access to the back yards of nearby residents. Although these concerns were either not substantiated at hearing or are irrelevant to District permitting criteria, they were nonetheless filed in good faith and not for an improper purpose.

CONCLUSIONS OF LAW

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

58. As the party seeking the issuance of two permits, the City bears the burden of proving by a preponderance of the evidence that it is entitled to such permits. See Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

59. The District's requirements applicable to the City's stormwater application are found in Rules 40C-42.023(1), 40C-42.025, 40C-42.026(1), 40C-42.027, 40C-42.028, and 40C-42.029, Florida Administrative Code. By a preponderance of the evidence,

the City has demonstrated compliance with all pertinent criteria. The City has also satisfied the additional requirements in Rule 40C-41.063(6), Florida Administrative Code, for projects located within the Sensitive Karst Areas Basin.

60. The District's requirements applicable to the City's noticed general environmental resource permit application are found in Rule 40C-400.475(2), Florida Administrative Code. By a preponderance of the evidence, the City has provided the reasonable assurances required by the rule.

61. Finally, the City has asked that Petitioners be required to reimburse it for attorney's fees and costs on the theory that the petitions were filed for an improper purpose. Section 120.595(1)(b), Florida Statutes (Supp. 1996), provides that:

The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.

62. Subparagraph (e)1. of the same statute defines the term "improper purpose" as follows:

"Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity.

63. The City did, of course, prevail in these actions. Even so, the record does not support an award of attorney's fees and costs. This is because the undersigned has concluded that

the petitions were filed in good faith and not for the purpose of delaying the issuance of the permits or needlessly increasing the costs of the City in securing the permits. This being so, the request by the City for attorney's fees and costs is denied.


64. Finally, the District's Motion to Strike Petitioners' Proposed Recommended Order as being untimely is granted. Here, Petitioners failed to request leave to late-file their order, the order does not comport with the format required by Division rule, and the order essentially responds to proposed findings contained in the City's filing.

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 approving the applications of the City of Gainesville and issuing the requested permits.

DONE AND ENTERED this 19th day of December, 1997, in Tallahassee, Leon County, Florida.


DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of December, 1997.

COPIES FURNISHED:

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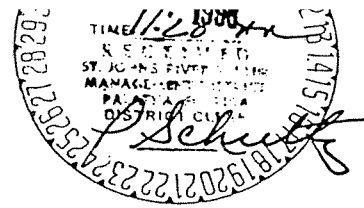
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order within fifteen days. Any exceptions to this Recommended Order should be filed with the St. Johns River Water Management District.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS



GREENSPACE PRESERVATION
ASSOCIATION, INC., ET AL,

DOAH CASE NO. 97-002845
97-002846
SJRWMD FOR NO. 97-1769

Petitioners,

vs.

CITY OF GAINESVILLE AND ST. JOHNS
WATER MANAGEMENT DISTRICT,

Respondents.

**EXCEPTIONS TO RECOMMENDED ORDER BY RESPONDENT, ST. JOHNS
RIVER WATER MANAGEMENT DISTRICT**

Respondent, St. Johns River Water Management District ("District"), by and through its undersigned attorney, files these exceptions to the Recommended Order entered by the Administrative Law Judge ("ALJ") in this matter. The District's exceptions are as follows:

1. Exceptions to Conclusions of Law

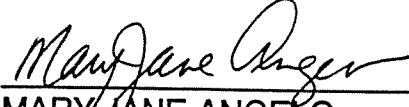
Paragraph No. 60 of the Recommended Order states that the "District's requirements applicable to the City's noticed general environmental resource permit application are found in Rule 40C-400.475(2), Florida Administrative Code." This statement is not complete. The applicable noticed general environmental resource permit requirements are found in Rule 40C-400.475(1), as well as in Rule 40C-400.475(2), Florida Administrative Code. Therefore, the ALJ's recommended

conclusion of law No. 60 should be corrected in the Final Order to refer to both Rules 40C-400.475(1) and (2), Florida Administrative Code.

2. Exceptions to Recommendation

The ALJ recommends that "the St. Johns River Water Management District enter a final order approving the applications of the City of Gainesville and issuing the requested permits." The ALJ does not recommend the specific conditions that should be placed on the permits. The Final Order should grant the City of Gainesville's application for a stormwater management system permit subject to the District's standard limiting conditions, Environmental Resource Permitting Stormwater General Conditions 1 through 19, Special MSSW conditions 1, 7, 8, 9, and 28, and Other Conditions 1, 2, and 3, and should grant the City of Gainesville's application for a noticed general environmental resource permit subject to the District's standard Noticed General Environmental Resource Permit Conditions in Rule 40C-400.215(1) through (13), Fla.Admin.Code. All of these conditions were admitted into evidence at the final hearing in this matter and were implicitly accepted by the ALJ in his Recommended Order which adopted District staff's recommendations. The recommendation for approval of the permits subject to these conditions comprises the District staff's complete recommendation for action by the Governing Board.

Respectfully submitted,



MARY JANE ANGELO
JENNIFER B. SPRINGFIELD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing EXCEPTIONS TO RECOMMENDED ORDER was sent to SAMUEL A. MUTCH, Attorney for Petitioners, 2790 NW 43rd Street, Suite 100, Meridien Centre, Gainesville, Florida 32606, and RICHARD WHIDDEN, Attorney for the City, City of Gainesville, P.O. Box 1110, Gainesville, Florida 32602, by facsimile and by U. S Mail on this 6th day of January, 1998.


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Fla. Bar No. 457530
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Water Management District
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BEFORE THE ST. JOHN'S
RIVER WATER MANAGEMENT DISTRICT

GREENSPACE PRESERVATION
ASSOCIATION, INC., et al.,

Petitioners,

v.

SJRWMD FOR Nos. 97-1769 and 97-1770
DOAH Case Nos. 97-2845 and 97-2846

ST. JOHNS RIVER WATER MANAGEMENT
DISTRICT and CITY OF GAINESVILLE,
a Municipal Corporation,

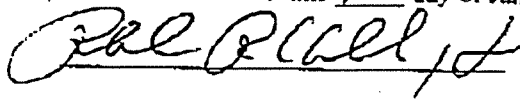
Respondents.

CITY OF GAINESVILLE'S RESPONSE TO EXCEPTIONS

The City of Gainesville (City), pursuant to Rule 40C-1.564(4) F.A.C., files this its response to the exceptions submitted by respondent St. Johns River Water Management District (District). In response to the District's exceptions, the City agrees and concurs with both exceptions submitted by the District in this matter.

WHEREFORE, the City states that it agrees with the exceptions filed by the District in this matter and respectfully requests that those exceptions be made a part of the final order in the above-captioned case.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Samuel A. Mutch, Esq., Attorney for the Petitioners, 2790 NW 43rd Street, Suite 100, Gainesville, Florida 32606, Jennifer B. Springfield, Esq. and Mary Jane Angelo, Esq., Council for St. Johns River Water Management District, P.O. Box 1429, Palatka, Florida 32178-1429 this 9th day of January, 1998.



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