

DANIEL J. LOBECK*
MARK A. HANSON*
MICHELLE A. ROWE
LEAH E. ELLINGTON*

THE LAW OFFICES OF
LOBECK & HANSON

PROFESSIONAL ASSOCIATION

CONDOMINIUM
COOPERATIVE AND
HOMEOWNERS
ASSOCIATIONS

KIMLYN M. WALKER
CAITLIN A. DREHER

2033 MAIN STREET, SUITE 403
SARASOTA, FL 34237
(941) 955-5622
FAX (941) 951-1469

E-MAIL law@lobeckhanson.com
INTERNET www.lobeckhanson.com

CIVIL LITIGATION
PERSONAL INJURY
FAMILY LAW
LAND USE LAW
TRUSTS AND ESTATES

* FLA. BOARD CERTIFIED SPECIALIST IN CONDOMINIUM
AND PLANNED DEVELOPMENT LAW

March 7, 2023

Via e-mail (Kmichaels@venicefl.gov) and
U.S. Mail

Kelly Michaels
City Clerk, Venice Florida
401 W Venice Ave.
Venice, FL 34285


Re: Appeal of City of Venice Planning Commission Decision Approving
Pickleball Courts at the Venetian Golf and River Club Community

Dear Ms. Michaels:

The undersigned represents the applicant, Venetian Community Development District in connection with the above-referenced matter scheduled to be heard on Tuesday, March 14, 2023. Enclosed please find a Recommended Order of Administrative Law Judge John D. C. Newton, II, the Florida Division of Administrative Hearings to be included as part of the record to be considered by the City Commissioners on March 14, 2023.

Thank you for your attention to this matter.

Very truly yours,


Mark A. Hanson, Esquire

MAH:en
Enclosure

cc: Kelly Fernandez, Esquire
Richard Bracco, Chairman Venetian Community Development District

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

HARVEY FELTQUATE,

Petitioner,

Case No. 22-2212

vs.

SOUTHWEST FLORIDA WATER
MANAGEMENT DISTRICT,

Respondent,

and

VENETIAN COMMUNITY DEVELOPMENT
DISTRICT,

Intervenor.

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Florida Division of Administrative Hearings (DOAH), conducted the final hearing in this matter on January 5, 2023, by Zoom Conference.

APPEARANCES

For Petitioner: Harvey Feltquate, pro se
105 Bella Vista Terrace, Unit D
North Venice, Florida 34275

For Respondent: Megan Albrecht, Esquire
Southwest Florida Water Management District
7601 US Highway 301 North
Tampa, Florida 33637

For Intervenor: Mark A. Hanson, Esquire
Loebeck & Hanson, P.A.
2033 Main Street, Suite 403
Sarasota, Florida 34237

STATEMENT OF THE ISSUES

Should Respondent, Southwest Florida Water Management District (District), issue Environmental Resource Permit (ERP) No. 43021171.037 authorizing modification of ERP No. 49021171.005 authorizing Venetian Community Development District (Venetian Community) to remove a portion of parking lot and construct three pickleball courts in its stead? More specifically, (a) will the proposed project adversely affect the existing stormwater management system, and (b) will the proposed project increase stormwater runoff?

PRELIMINARY STATEMENT

By letter dated February 22, 2022, the District advised Venetian Community that the District intended to grant its application to modify ERP No. 49021171.005 to permit Venetian Community to remove a portion of a parking lot and construct three pickleball courts in its place. Petitioner, Harvey Feltquate, contested the intended decision in a letter that the District treated as a petition for an administrative hearing. The District then dismissed the petition as inadequate. On July 11, 2022, Mr. Feltquate submitted an amended petition. The District referred the amended petition to DOAH to conduct an administrative hearing. Venetian Community intervened to support the District's intended decision. After one continuance, granted because of the disruptions of Hurricane Ian, the hearing was noticed for January 5, 2023, and held as noticed.

The parties' Joint Exhibit 1 was admitted.

District Exhibit 1 was admitted. The District presented testimony from Robert McDaniel, P.E.

Mr. Feltquate did not offer exhibits into evidence. Mr. Feltquate presented testimony from Arnold Weitzman, P.E.

Venetian Community presented testimony from Richard Schappacher, P.E. Venetian Community Exhibit 1 was admitted into evidence.

The transcript of the hearing was filed January 23, 2023. The parties timely filed proposed recommended orders. They have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Venetian Community is a community development district that owns the real property within the Venetian Golf and River Club. It proposes to construct three pickleball courts to replace a portion of a parking lot. Venetian Community is the permit applicant and proposed recipient of the permit.

2. The District is the state agency charged with the responsibility to conserve, protect, manage, and control the water resources within its geographic boundaries, and to administer and enforce chapter 373, Florida Statutes (2022),¹ and the rules promulgated under its authority in Florida Administrative Code Chapter 62-330. The District is the permitting authority in this proceeding. It issued the proposed agency action, granting the permit to Venetian Community.

3. Mr. Feltquate lives in the Venetian Golf and River Club.

The Project

4. On November 10, 2021, Venetian Community submitted ERP Application Number 836578 (Application) for construction of three pickleball courts within the Venetian Golf and River Club.

5. Venetian Community's engineering consultant, Richard Schappacher, P.E., prepared the Application. The Application consists of various documents and materials, including: the formal application; proposed plans with aerial views; proof

¹ All citations to Florida Statutes are to the 2022 compilation unless otherwise noted.

of legal ownership; AutoCAD exhibits; drainage calculations; and a response to the District's Request for Additional Information (RAI).

6. Venice Community's Application proposes replacing 13 existing parking spaces with three pickleball courts in the Venetian Golf and River Club amenities area.

7. The proposed project will reduce the total amount of impervious area from 6,333.83 square feet to 6,282.02 square feet.

8. The District approved the Application by letter dated February 22, 2022, from District ERP Bureau Chief David Kramer to Richard Bracco of Venetian Community.

Permitting Criteria

A. Permit Application and Review

9. An entity that seeks to construct a project that affects stormwater runoff must obtain an ERP from the District.

10. The District classifies each ERP application as either a "new" permit application (covering a "green-space condition, when nothing has ever been permitted on the site") or a permit "modification" application (where the site already has "permitting history"). (Tr. Vol. I, p. 67). The District then classifies a permit modification application as either a "major" or a "minor" modification. A major modification involves alterations to the stormwater management system. A minor modification is a "very simple exercise" involving a review of any changes in impervious area. (Tr. Vol. I, p. 68).

11. The District reasonably classified Venetian Community's proposal as a minor modification "due to the relatively simple nature of the conversion of the site from a parking [lot], to the pickleball courts, and the fact that there is no modification to the receiving stormwater systems, there's no modification to the pond or the control structure, it's just merely a simple land-use change." (Tr. Vol. I, p. 82).

12. A standard ERP application contains administrative items, proof of property ownership, technical documents, stormwater runoff calculations, drawings, plans,

and other relevant information provided by the applicant. Mr. Schappacher prepared and submitted a standard application to the District.

13. If District staff need additional information or clarification for the application review, the permit application reviewer may issue an RAI to the applicant, which is required to respond. All responses to RAIs become part of the application and the District's file of record.

14. Mia Kran, a student intern at the District, initially reviewed the Application. Ms. Kran issued an RAI to Mr. Schappacher. It requested proper certification of the plans and drainage report and made the following two requests.

15. "Please review the spot elevations at the south border of the project. Please verify that the stormwater will be conveyed as previously permitted/shown by the basin boundary. [Section E, Part C.9 of the ERP Application.]" (J. Ex. 1, p 25).

16. "Please revise the construction plans to include the location and details of all applicable erosion, sediment and turbidity control measures to be implemented during each phase of construction and any permanent control measures to be implemented in post-development conditions (if applicable). [Section E, Part 3(b), ERP Application]." (J. Ex. 1, p 25).

17. Venetian Community provided Ms. Kran satisfactory information. Mr. McDaniel conducted a secondary review of the Application, and "[e]verything seemed consistent with what the engineer had provided. We didn't have any reason to think that was inaccurate." (Tr. Vol. 1, pp. 51-52).

18. District staff rely primarily on the information submitted by an applicant when reviewing an ERP application.

19. Once a District permit application reviewer approves an ERP application, senior District staff conduct a secondary review of the permit application. Next, they route it to the District's ERP Bureau Chief, David Kramer, for final review, approval, and permit issuance.

20. The District followed its typical procedures for reviewing an ERP minor modification application in this matter. The procedures did not include an onsite inspection. An onsite inspection is not required for each ERP application review.

Onsite inspections are typically performed only if the reviewer has questions about existing conditions on the project site. There were no questions about the proposed project or the application that required an onsite review.

21. The District previously permitted the Venetian Golf and River Club's existing master stormwater management system. The system has four primary outfalls. Three outfalls discharge into the Myakka River. One outfall discharges into Dona Bay. Stormwater runoff from the area of the proposed project flows into existing grated inlets, through an underground pipe network, and discharges into two stormwater ponds identified as Lake 12 and Lake 14 on the permitted master stormwater management system plans. Once captured in Lake 12 and Lake 14, the stormwater runoff receives appropriate water quality treatment and attenuation before ultimately discharging into the Myakka River.

22. The existing network of inlets and pipes are capable of handling stormwater runoff from the proposed project because "they are currently able to accommodate runoff from the parking lot. Due to the fact that there is a reduction in the impervious [area], we expect those pipes to function similarly, if not better." (Tr. Vol. I, p. 85).

23. During the most recent major storm event, Hurricane Ian, the existing stormwater management system for the Venetian Golf and River Club functioned "way better than ever anticipated." (Tr. Vol. I, p. 134). An aerial photograph of the Venetian Golf and River Club taken on October 1, 2022, "the day the Myakka River crested" after Hurricane Ian, depicted only moderate flooding within the community, and primarily only on the roadways.

B. Florida Administrative Code Rule 62-330.301

24. To obtain an ERP from the District, an applicant must provide "reasonable assurances," pursuant to rule 62-330.301, that the proposed project meets the conditions for permit issuance. District staff must exercise a level of professional judgment in determining whether an applicant has provided the requisite reasonable assurances.

25. Rule 62-330.301 provides, in pertinent part:

62-330.301 Conditions for Issuance of Individual and Conceptual Approval Permits.

(1) To obtain an individual or conceptual approval permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:

(a) Will not cause adverse water quantity impacts to receiving waters and adjacent lands;

(b) Will not cause adverse flooding to on-site or off-site property;

(c) Will not cause adverse impacts to existing surface water storage and conveyance capabilities;

(d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;

(e) Will not adversely affect the quality of receiving waters such that the state water quality standards set forth in Chapters 62-4, 62-302, 62-520, and 62-550, F.A.C., including the antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), F.A.C., subsections 62-4.242(2) and (3), F.A.C., and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated;

(f) Will not cause adverse secondary impacts to the water resources ... ;

(g) Will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to Section 373.042, F.S.;

(h) Will not cause adverse impacts to a Work of the District established pursuant to Section 373.086, F.S.;

(i) Will be capable, based on generally accepted

engineering and scientific principles, of performing and functioning as proposed;

(j) Will be conducted by a person with the financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued; and

(k) Will comply with any applicable special basin or geographic area criteria established

26. The proposed project will not adversely affect the existing stormwater management system within the Venetian Golf and River Club. It will not cause adverse flooding or water quality impacts. Additionally, the proposed project will not adversely affect the wetland conservation area abutting the community.

27. A reduction in impervious area, like that of the proposed project, often results in less stormwater runoff leaving the property and less stormwater runoff ending up in stormwater ponds. In this case that means the proposed project will reduce the stormwater runoff into the Myakka River and Dona Bay.

28. Additionally, the change in use from a vehicular parking lot to a recreational area has environmental benefits. Unlike a parking lot, the pickleball courts will not contribute vehicle pollutants to the stormwater runoff.

29. All in all, the proposed project will benefit the stormwater management system by decreasing the total impervious area and reducing pollutants captured in stormwater runoff. It otherwise complies with the applicable regulatory criteria, including rule 62-330.301.

CONCLUSIONS OF LAW

Jurisdiction

30. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

Burden and Standard of Proof

31. This is a de novo proceeding to formulate final agency action. It is not an appeal to review action taken earlier and preliminarily. *See Young v. Dep't of Cmty. Aff.*, 625 So. 2d 831, 833 (Fla. 1993); *Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Env't. Regul.*, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977). Mr. Feltquate bears the ultimate burden of proving the District should not approve the proposed project. § 120.569(2)(p), Fla. Stat. He must prove this by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

Conditions for Permit Issuance and the Reasonable Assurances Standard

32. To obtain an ERP, an applicant must provide reasonable assurances that the proposed activities will meet the conditions for permit issuance established by chapter 62-330. *See* § 373.414(1), Fla. Stat.

33. Reasonable assurances means "a substantial likelihood that the project will be successfully implemented." *Metro Dade Cnty. v. Coscan Florida, Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992). A permit applicant provides reasonable assurances when it has demonstrated a substantial likelihood of success and that the project will not run afoul of the intent or purpose behind the statute or rule. *Id.* However, the applicant's burden is one of reasonable assurances, not absolute guarantees. *See Mansota-88, Inc. v. Agrico Chem. Co.*, Case No. 87-2433 (Fla. DOAH Jan. 5, 1990), *modified in part*, OGC File No. 87-0664 at ¶18 (Fla. DER Feb. 19, 1990).

34. Additionally, the reasonable assurances standard only requires the applicant to address "reasonably foreseeable contingencies" in establishing entitlement to a permit. *Putnam Cnty. Env't Council, Inc., et al. v. Dep't of Env't Prot., et al.*, Case No. 01-2442 (Fla. DOAH July 3, 2002; Fla. DEP Aug. 6, 2002). The applicant is not required to disprove all "worst case scenarios" or "theoretical impacts" raised by the permit challenger. *Id.* at 65. The reasonable assurances standard "does not require an absolute guarantee that the project will not violate applicable requirements under any and all circumstances." *Last Stand & George Halloran v. KW Resort Utilities Corp., Dep't of Env't Prot.*, Case No. 14-5302 (Fla. DOAH Jan. 15, 2016);

OGC Case No. 14-0393 (Fla. DEP Feb. 24, 2016). Lastly, "[s]peculation about what 'might' occur is not sufficient to satisfy Petitioners' burden to show, by a preponderance of the evidence, that KWRU did not provide reasonable assurance[s]" *Id.* at 96.

35. Venetian Community presented a prima facie case demonstrating entitlement to approval of its application and issuance of the requested modification permit. The credible and persuasive testimony of Mr. Schappacher and Mr. McDaniel proved that the proposed project will actually benefit the existing stormwater management system by removing existing impervious area and reducing total stormwater runoff.

36. Mr. Feltquate did not meet his burden of ultimate persuasion. He did not present competent, substantial evidence proving the application should be denied. Mr. Weitzman, though a retired Professional Engineer, lacked knowledge specific to the design and permitting of stormwater management systems in Florida, including the Venetian Community Development District. Moreover, Mr. Weitzman further lacked knowledge of the applicable regulatory criteria. Mr. Weitzman's opinion testimony was largely speculative, general, and conclusory.

37. Mr. Schappacher and Mr. McDaniel were more credible and persuasive. Their experience in the design and evaluation of stormwater runoff systems was more recent and more extensive and involved application of Florida's requirements. Their testimony was also supported by credible exhibits. In contrast, for example, Mr. Weitzman testified about using a different program to calculate the area of the proposed pickleball courts and the existing parking lot. But information about the program and documentation of its use and results were not offered into evidence.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Southwest Florida Water Management District, issue Environmental Resource Permit No. 43021171.037 authorizing modification of Environmental Resource Permit No. 49021171.005 to authorize Venetian

Community Development District to remove a portion of a parking lot and construct three pickleball courts in its stead.

DONE AND ENTERED this 17th day of February, 2023, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of February, 2023.

COPIES FURNISHED:

Megan Albrecht, Esquire
(eServed)

Harvey Feltquate
(eServed)

Edward Willner
(eServed)

Mark A. Hanson, Esquire
(eServed)

Kimlyn Walker, Attorney
(eServed)

Brian J. Armstrong, P.G. Executive
Director
(Address of Record)

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.