IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2008

MARION COUNTY,

Appellant,

v. Case No. 5D07-1239

C. RAY GREENE, III AND
ANGUS S. HASTINGS, ET AL.,

Appellee.
_____/

Opinion filed August 1, 2008

Administrative Appeal from the St. Johns River Management District.

Thomas L. Wright, County Attorney and Thomas D. MacNamara, Ocala, for Appellant.

Wayne E. Flowers of Lewis Longman & Walker, P.A., Jacksonville, for Appellees C. Ray Greene, III and Angus S. Hastings.

Timothy A. Smith, Senior Assistant General Counsel, Palatka, for Appellee, St. Johns River Water Management District.

PALMER, C.J.,

Marion County appeals the final order entered by the St. John's River Water Management District (District) adopting the order of the Administrative Law Judge (ALJ), which recommended approval of the application filed by C. Ray Greene and Angus S. Hastings (collectively Greene) for a consumptive use permit (CUP). Determining that the ALJ committed no reversible error, we affirm.

Greene submitted a CUP application to the District, requesting authorization to withdraw groundwater for bottling and distribution as drinking water through an existing well. Marion County objected to the issuance of a permit, contending that the proposed withdrawal and use were not in the public interest and were inconsistent with Marion County's interests, plans, and regulations. After recovering further submissions by all parties, the District published a notice of its intent to approve Greene's application. Marion County responded by filing a petition for an administrative hearing.

The ALJ conducted a formal administrative hearing. Several expert witnesses testified on behalf of Greene. In sum, Greene's expert witnesses testified that the proposed use did not violate any of the criteria set forth by applicable CUP statutes. Marion County's witnesses proffered testimony[1] that the bottling of water on the subject property required a special use permit (SUP) under the Marion County Land Development Code and that no SUP had been issued to Greene. The ALJ rendered a recommended order concluding that the District should approve Greene's application.

The District approved the ALJ's order, thereby adopting the ALJ's findings of fact and conclusions of law and rejecting all of the parties' exceptions but one which was added as an additional conclusion of law.[2] This appeal timely followed.

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[1]The testimony was proffered because Greene previously filed a motion in limine, which the ALJ granted. The motion argued that evidence concerning compliance with Marion County's comprehensive plan and zoning regulations was irrelevant to the application for the CUP.

[2]The additional conclusion of law clarified that only the first paragraph of Section 373.223(3) of the Florida Statutes applies to the application, since that paragraph excepts the transport and use of water supplied exclusively for bottled water from the remainder of the subsection.

The standard of review of a final agency order by a district court of appeal is whether the agency's interpretation of the law is clearly erroneous. Novick v. Dep't. of Health Bd. of Medicine, 816 2d 1237 (Fla. 5th DCA 2002).

Section 373.223(1) of the Florida Statutes sets forth the core criteria for issuance of a CUP and specifies the statutory conditions as follows:

> **§373.223 Conditions for permit. —**
>
> (1) To obtain a permit pursuant to the provisions of this chapter, the applicant must establish that the proposed use of water:
> (a) Is a reasonable-beneficial use as defined in s. 373.019;
> (b) Will not interfere with any presently existing legal use of water; and
> (c) Is consistent with the public interest.

§373.223(1), Fla. Stat. (2007). These three requirements are commonly referred to as the "three-prong test." See Southwest Fla. Water Mgmt. Dist. v. Charlotte County, 774 So. 2d 903 (Fla. 2d DCA 2001). The Legislature has granted the District the authority to adopt rules to implement the provisions of law regarding permitting of consumptive uses of water. See §§ 373.113, 373.171, Fla. Stat. (2007). As a result, the District has adopted rules specifying conditions for issuance of a CUP. For example, Rule 40C-2.301(2)&(3)&(4) of the Florida Administrative Code provides:

> **40C-2.301. Condition for Issuance of Permits.**
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> * * *
>
> (2) To obtain a consumptive use permit for a use which will commence after the effective date of implementation, the applicant must establish that the proposed use of water:
>
> (a) Is a reasonable beneficial use; and
> (b) Will not interfere with any presently existing legal use of water; and

(c) Is consistent with the public interest.

(3) For purposes of subsection (2)(b) above, "presently existing legal use of water" shall mean those legal uses which exist at the time of receipt of the application for the consumptive use permit.

(4) The following criteria must be met in order for a use to be considered beneficial:

(a) The use must be in such quantity as is necessary for economic and efficient utilization.

(b) The use must be for a purpose that is both reasonable and consistent with the public interest.

* * *

(1) The consumptive use must not cause water levels or flows to fall below the minimum limits set forth in Chapter 40C-8, F.A.C.

Fla. Admin. Code Rules 40C-2.301(2)&(3)&(4). In addition, the District adopted by rule the Applicant's Handbook: Consumptive Uses of Water which provides further explanation of the criteria found in Chapter 40C-2 as well as direction to applicants regarding the type of information and data that must be submitted in order to obtain a CUP.

Marion County asserts that the final order of the District is clearly erroneous because the District improperly overlooked county public interests when considering the public interest requirement for issuance of a CUP. We disagree.

Before issuance of a CUP, an applicant must show that the proposed use of water is a reasonable beneficial use. Section 373.019(6), Florida Statutes (2007), defines reasonable-beneficial as: "[t]he use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both

reasonable and consistent with the public interest." Public interest is defined as being "[t]hose rights and claims on behalf of people in general. In determining the public interest in consumptive use permitting proceedings, the Board will consider whether an existing or proposed use is beneficial or detrimental to the overall collective well-being of the people or to the water resources in the area, the District and the State." §9.3, Applicant's Handbook.

In the present case, Greene presented sufficient evidence indicating that there was a need for the amount of water requested. Additionally, the evidence presented was sufficient to demonstrate that the CUP was consistent with the public interest.

Next, Marion County claims that the use proposed by Greene requires issuance of a SUP from Marion County and, because Greene did not show that a SUP had been issued prior to issuance of the CUP, the District erred in issuing the CUP. We again disagree.

Chapter 373 of the Florida Statutes grants the District exclusive authority to approve CUP applications. Section 373.217(3) expressly states that when a county ordinance is in conflict with the water management district's exclusive authority, the ordinance is deemed superseded for purposes of regulating the consumptive use of water. Neither the statutes nor the rules regarding CUPs impose any requirements on the District related to compliance with a local government's comprehensive plan or land development regulations. As such, the ALJ properly found:

> The District does not consider whether local government approvals have been obtained prior to issuance of a CUP for purposes of determining whether the application is consistent with the public interest. Neither does the District

> consider impacts related to local roads from trucks transporting the water or other impacts not related to water resources. No such requirements are included in the District's adopted permitting criteria.

Marion County also argues that the District has a duty to manage the water resources of the District to ensure their sustainable use, including future increases in demand, and that the District violated that duty by granting Greene's CUP because the planning study document shows that groundwater withdrawals in the county will be limited if all anticipated groundwater demands come to fruition within a 20-30 year time period. We disagree.

The second prong of the three prong test requires the District to determine whether a proposed use will interfere with any presently existing legal use of water before issuing a CUP. Rule 40C-2.301(3), Florida Administrative Code, defines presently existing legal use as "those legal uses which exist at the time of receipt of the application for the consumptive use." Thus, the District need only consider those uses which are already permitted or are exempt from permitting at the time the application is received. As such, in determining whether to grant Greene's CUP application, the District was not required to consider future or potential uses.

Marion County also argues that the record evidence fails to demonstrate that Greene's proposed use of water was consistent with the public interest as required by the third prong of the test. In examining whether an application is consistent with the public interest, the District considers whether the use of water is efficient, whether there is a need for the water requested, and whether the use is for a legitimate purpose. The inquiry focuses on the impact of the use on water resources and existing legal users.

Our review of the evidence reveals that there were not any conditions that would require the District to deny the permit application.

Marion County also contends that the District erred by failing to consider required statutory considerations set forth in section 373.223(3) of the Florida Statute (2007). However, the language of the statute expressly exempts bottled water from consideration. Specifically, section 373.223(3) of the Florida Statutes (2007) states:

> **373.223 Conditions for a permit.—**
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> *** * ***
>
> (3) Except for the transport and use of water supplied by the Central and Southern Florida Flood Control Project, and anywhere in the state when the transport and use of water is supplied exclusively for bottled water as defined in s. 500.03(1)(d), any water use permit applications pending as of April 1, 1998, with the Northwest Florida Water Management District and self-suppliers of water for which the proposed water source and area of use or application are located on contiguous private properties, when evaluating whether a potential transport and use of ground or surface water across county boundaries is consistent with the public interest, pursuant to paragraph (1)(c), the governing board or department shall consider:

§ 373.223(3), Fla. Stat. (2007). Thus, these factors need not have been considered while evaluating the instant CUP application. Instead, section 373.233(2) of the Florida Statutes applies. That section states:

> **373.223 Conditions for a permit.—**
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> *** * ***
>
> (2) The governing board or the department may authorize the holder of a use permit to transport and use ground or surface water beyond overlying land, across county boundaries, or outside the watershed from which it is taken if the governing board or department determines that such transport and use is consistent with the public interest, and no local government shall adopt or enforce any law, ordinance, rule, regulation, or order to the contrary.

§373.233(2), Fla. Stat. (2007). The District fully evaluated whether the CUP was consistent with the public interest and properly determined that it was consistent.

AFFIRMED.

MONACO, J., concurs specially with opinion.
LAWSON, J., dissents with opinion.

MONACO, J., concurring. Case No. 5D07-1239

While I concur with the affirmation of the order of the St. John's River Water Management District which adopts the order of the Administrative Law Judge recommending approval of the application of the appellees, I do so not because I think it is a good idea to allow this consumptive use of fresh water resources, but because I conclude that the legislation in place supports the position of the District. Judge Lawson is correct in his dissent that the District's approval appears to be shortsighted. Nevertheless, the District has made a determination that the consumptive use permit is consistent with the public interest, and that determination has the necessary record support. I cannot agree to reverse, therefore, because to do so would require us to rewrite the applicable statute.

LAWSON, J., dissenting. Case No. 5D07-1239

I respectfully dissent. In my view, the District's interpretation and application of section 373.223, Florida Statutes, is clearly erroneous. That statute requires a CUP applicant to show that its permit is "consistent with the public interest." In this case, the District has approved a permit that allows a private land-owner to tap into the Floridan Aquifer, in Marion County, Florida, and withdraw almost 500,000 gallons of water per day, for 20 years into the future, for bottling and shipping elsewhere, with no consideration of how this use of an extraordinarily valuable and limited state resource will impact the citizens of Marion County,[1] all of Florida,[2] or our state's other natural resources[3] in the future. According to the District's witnesses, the District considers it to be "in the public interest" to permit withdrawal of water from the Floridan Aquifer into the future, for bottling and shipping elsewhere, "as long as the water is available" today. Consistent with this testimony, the District concludes in its final order that:

> If a source of water is available for use [today], and a beneficial use can be made of water from the source, and if a proposed use of the source meets all of the District's criteria for such use, the District has no basis on which to deny that applicant's request for a permit to use water from the source.

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[1] Marion County presented testimony that issuance of this 20-year permit will "allow the removal of water from the ground water right up to the point where ground water no longer is available to meet the future needs of Marion County" and its citizens.

[2] The Floridan Aquifer underlies all of Florida, and is the principal source of water supply in most of North and Central Florida.

[3] Among those natural resources, for example, are the largest first-magnitude artesian spring formations in the United States, Silver Springs (the headwater of the Silver River), and the fourth-largest first-magnitude artesian spring formation in the State, Rainbow Springs (the headwater of the Rainbow River).

To me, this interpretation of the statute makes no sense. When considering a permit that will authorize water use long into the future, I believe that the District's public interest determination must necessarily take into consideration the anticipated impact of the water usage over the life of the permit. Therefore, I would reverse with directions that the District determine whether the water use allowed by this permit in the future (over the life of the permit) is consistent with the public interest.