

BEFORE THE GOVERNING BOARD OF THE  
SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT

JOSEPH MCCLASH,

Petitioner,

and

SIERRA CLUB, INC., AND SUNCOAST  
WATERKEEPER, INC.,

Intervenors,

Case No. 14-4735

vs.

LAND TRUST NO. 97-12 AND  
SOUTHWEST FLORIDA WATER  
MANAGEMENT DISTRICT,

Respondents.

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MANASOTA-88, INC.,

Petitioner,

and

SIERRA CLUB, INC., AND SUNCOAST  
WATERKEEPER, INC.,

Intervenors,

Case No. 14-5038

vs.

LAND TRUST NO. 97-12 AND  
SOUTHWEST FLORIDA WATER  
MANAGEMENT DISTRICT,

Respondents.

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FLORIDA INSTITUTE FOR SALTWATER  
HERITAGE, INC.,

Petitioner,

and

SIERRA CLUB, INC., AND SUNCOAST  
WATERKEEPER, INC.,

Intervenors,

Case No. 14-5135

vs.

LAND TRUST NO. 97-12 AND  
SOUTHWEST FLORIDA WATER  
MANAGEMENT DISTRICT,

Respondents.

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**FINAL ORDER**

THIS CAUSE was heard by the Governing Board of the Southwest Florida Water Management District ("District") pursuant to Sections 120.569 and 120.57(1), Florida Statutes ("F.S."), for the purpose of issuing a final order in the above-styled proceeding, including consideration of the Recommended Order of Administrative Law Judge ("ALJ") Bram D. E. Canter, the Exceptions to the Recommended Order filed by Respondent, Land Trust No. 97-12 ("Land Trust"), the Exceptions to the Recommended Order filed by the District, and the Joint Response to such exceptions filed by Joseph McClash ("McClash"), Manasota-88, Inc., Florida Institute for Saltwater Heritage ("FISH"), (collectively, "Petitioners"), Sierra Club, Inc., and Suncoast Waterkeeper, Inc. (collectively, "Intervenors").

### **A. Statement of the Issue**

1. The issue is whether reasonable assurance has been provided for the issuance of Environmental Resource Permit (“ERP”) No. 43041746.000 (the “Permit”) to Respondent Land Trust for its proposed project on Perico Island in Bradenton, Florida.

### **B. Post-Hearing Procedural History**

2. On June 25, 2015, the ALJ issued his Recommended Order in this matter, a copy of which is attached hereto as Exhibit “A.”

3. On July 15, 2015, Respondent Land Trust timely filed Exceptions to the Recommended Order, a copy of which is attached hereto as Exhibit “B.”

4. On July 15, 2015, the District timely filed Exceptions to the Recommended Order, a copy of which is attached hereto as Exhibit “C.”

5. On July 27, 2015, Petitioners and Intervenors timely filed a Joint Amended Response to Respondents’ Exceptions to Recommended Order,<sup>1</sup> a copy of which is attached hereto as Exhibit “D.”

6. The record consists of all notices; pleadings; motions; intermediate rulings; evidence admitted and matters officially recognized; the transcript of the proceedings; proposed findings, exceptions and responses; stipulations of the parties; and the Recommended Order.

### **C. Standard of Review**

7. Section 120.57(1)(I), F.S., provides in pertinent part:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the

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<sup>1</sup> Petitioners and Intervenors filed an initial Joint response on Friday, July 24, 2015, and then filed an amended Joint Response on Saturday, July 25, 2015. The amended Joint Response is considered timely filed as of Monday, July 27, 2015.

conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of an administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

§ 120.57(1)(l), Fla. Stat. (2012).

8. The District may not reweigh evidence and may reject the ALJ's findings of fact in the Recommended Order only if, after a thorough review of the record, no competent substantial evidence exists to support the finding. Charlotte County v. IMC Phosphates Co., 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009) (citing Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996)); see also Walker v. Bd. of Prof'l Eng'rs, 946 So. 2d 604 (Fla. 1st DCA 2006) (an agency cannot modify or substitute new findings of fact if competent substantial evidence exists to support the ALJ's findings of fact).

9. Competent substantial evidence is defined as "evidence that will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957) (citing Becker v. Merrill, 20 So. 2d 912, 914 (Fla. 1943)). The evidence must be sufficiently relevant and must be such that "a reasonable mind would accept as a conclusion" and "[t]o this extent the 'substantial' evidence should also be 'competent.'" Id. Competent substantial evidence

does not relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence. 'Competency of evidence' refers to its admissibility under legal rules of evidence. 'Substantial' requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative, or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") as to each essential element ...".

Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n, 671 So. 2d 287, 289 n.3 (Fla. 1st DCA 1996) (citing Dunn v. State, 454 So. 2d 641, 649 n. 11 (Fla. 5th DCA 1984)). An ALJ may rely on the testimony of one witness, even if that testimony contradicts testimony of other witnesses. Lantz v. Smith, 106 So. 3d 518, 521 (Fla. 1st DCA 2013).

10. If findings of fact are supported by record evidence, the agency is bound by the ALJ's findings of fact. Charlotte County, 18 So. 3d at 1092 (citing Fla. Dep't of Corrs. v. Bradley, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987)). The District has no authority to reweigh the evidence, build a new case or make new factual findings. N.W. v. Dep't of Children & Family Svcs., 981 So. 2d 599, 602 (Fla. 3d DCA 2008); Lawnwood Med. Ctr., Inc. v. Agency for Health Care Admin., 678 So. 2d 421, 425 (Fla. 1st DCA 1996).

11. An agency may reject or modify an ALJ's conclusions of law and application of agency policy; however, when doing so, the agency must make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. Charlotte County, 18 So. 3d at 1092.

**D. The Recommended Order and Exceptions**

12. The Governing Board has reviewed the Recommended Order.

13. The Governing Board has reviewed the Exceptions filed by Land Trust and the District, and the joint response thereto filed by Petitioners and Intervenors, and has considered the underlying arguments presented therein. The Governing Board has ruled on each of the Exceptions for the reasons set forth in the Ruling on Exceptions to the Recommended Order (“Ruling”), which is attached hereto and incorporated herein by reference as Exhibit “E.”

14. The Ruling generally finds that the mitigation proposed by the applicant was sufficient and that reduction and elimination of impacts to wetlands and other surface waters was adequately explored and considered.

**WHEREFORE**, the Governing Board hereby issues ERP No. 43041746.000 to Land Trust No. 97-12, a copy of which is attached hereto as Exhibit “F.”

**DONE AND ORDERED** by the Governing Board of the Southwest Florida Water Management District this 25<sup>th</sup> day of August, 2015, in Tampa, Hillsborough County, Florida.

SOUTHWEST FLORIDA WATER  
MANAGEMENT DISTRICT

By: \_\_\_\_\_  
Michael A. Babb, Chair

Attest: \_\_\_\_\_  
Jeffrey M. Adams, Secretary

(Seal)

Approved as to Legal Form and Content _____ Amy Wells Brennan, Managing Attorney
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Filed this \_\_\_\_ day of  
August, 2015.

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Deputy Agency Clerk

### **NOTICE OF RIGHTS**

In accordance with Section 120.569(1), F.S., a party who is adversely affected by final agency action may seek judicial review of the action in the appropriate District Court of Appeal pursuant to Section 120.68, F.S., by filing a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, within thirty (30) days after the rendering of the final action by the District.