

ADMINISTRATIVE APPEAL DECISION
STONEWAL ESTATES, PHASE 1, PLAT 3A
FILE NO. SAJ-2007-2220 (IP-EGR)
JACKSONVILLE DISTRICT
16 JULY 2010

Review Officer: Jason Steele, US Army Corps of Engineers, South Atlantic Division (SAD)

Appellant: LYEC Three, Inc.

Date of Receipt of Request for Appeal: 12 June 2009 & 11 December 2009

Acceptance of Request for Appeal: 15 December 2009

Appeal Conference: 23 June 2010

Authority: Section 404 of the Clean Water Act (CWA) (33 U.S.C. § 1344)

BACKGROUND

By letter dated 11 June 2009, LYEC Three, Inc. submitted a request for appeal (RFA) of the Jacksonville District's (District) approved jurisdictional determination and permit denial on a 70.84 acre parcel (Phase 1, Plat 3A) owned by the appellant. The property is located south of Northlake Boulevard, west of Beeline Highway, and north of Orange Avenue, Section 26, Township 42 South, Range 41 East, West Palm Beach, Palm Beach County, Florida.

The 70.84 acre project site was originally part of a 983.6-acre tract that was permitted for development by the South Florida Water Management District (SFWMD) in 1983, and has since been subdivided. The District has no record of any previous Department of the Army (DA) permit for this project site (Phase 1, Plat 3A). The District did issue a permit (SAJ-2004-1236) in 2006 to Lennar Homes, Inc. (also referred to as "Lennar/Centex"), which included 363.72 acres of the overall 983.6-acre site; however, that permit did not authorize impacts within the proposed project area (Phase 1, Plat 3A, 70.84 acre site). The 70.84 acre site is not part of the 363.72 acre Lennar Homes, Inc. site. Based on the Environmental Assessment / Statement of Findings (EA/SOF) dated 3 April 2006, all of the mitigation associated with DA permit number SAJ-2004-1236 was required to offset impacts on the 363.72-acre Lennar/Centex tract.

The appellant submitted a permit application on 22 March 2007 requesting authorization to impact 18.04 acres of jurisdictional wetlands and 17.22 acres of jurisdictional ditches and lakes for the construction of a residential development. No mitigation was offered with the submittal

of the original permit application. The District circulated a public notice for the project on 31 August 2007. On 25 January 2008, the appellant submitted a mitigation plan to create and restore approximately 10.40 acres of on-site freshwater marsh. On 8 June 2008, the appellant withdrew the mitigation plan from the project. The appellant explained that mitigation, for the proposed impacts, had previously been accomplished in accordance with the SFWMD's permit for the overall 983.6-acre site (of which the applicant's parcel was included).

On 13 April 2009, the District denied the permit, based on the project not being in compliance with the Section 404(b)(1) Guidelines; specifically the lack of a mitigation proposal. In addition, the District denied the permit based on the project being contrary to the public interest; specifically, the factors of conservation, wetlands, general environmental concerns, cumulative impacts, and threatened or endangered species were all contrary due to lack of a mitigation proposal.

The appellant contends that they did submit a mitigation proposal, in the form of an assessment that showed 5.30 functional units were necessary to offset the impacts associated with the proposed project, including impacts to wood stork suitable foraging habitat. Furthermore, the appellant contends that the 5.30 functional units should be offset through the excess mitigation that was provided through a previous permit issued by the USACE to Lennar/Centex Homes, under permit number SAJ-2004-1236.

SUMMARY OF DECISION

Appellant's request for appeal (RFA) does not have merit. The administrative record adequately supports the District's decision to deny the permit based on failure to comply with the 404(b)(1) Guidelines (40 CFR Part 230) and the project being contrary to the public interest (33 CFR Part 320.4).

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

1. The District provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.
2. The appellant's attorney supplied supporting documentation at the time of submittal of the RFA.
3. The District and appellant's attorney supplied information, at the time of the appeal conference, in the form of answered questions asked at the conference.
4. The appellant stated, at the time of the appeal conference, that they would like to remove their request for appeal of the approved jurisdictional determination.
5. The appellant supplied clarifying information in response to the draft Memorandum of Record (MFR) of the appeal conference.

APPELLANT'S STATED REASONS FOR APPEAL

Appeal Reason 1: "The Corps has incorrectly applied the 404(b)(1) Guidelines and has ignored evidence that compensatory mitigation has already been provided for any and all functional loss associated with the discharge to "waters of the United States" that may occur on the Project site."

EVALUATION OF THE REASONS FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE JACKSONVILLE DISTRICT ENGINEER (DE)

Appeal Reason 1: The Corps has incorrectly applied the 404(b)(1) Guidelines and has ignored evidence that compensatory mitigation has already been provided for any and all functional loss associated with the discharge to "waters of the United States" that may occur on the Project site.

Finding: This reason for appeal does not have merit.

Discussion: The appellant stated, on pages 16-17 of the 11 December 2009 RFA,

...in 2004, Lennar Homes, as an owner of property within the original site, applied for permits from the Corps and the SFWMD for residential development of 363.72 acres within the original permitted retention area. The Corps and the SFWMD authorizations for the Lennar Homes project required and recognized the mitigation terms of the [SFWMD] enforcement action final judgment, and specifically, the authorizations required Lennar to bring into compliance / complete all previously agreed / permitted mitigation for the original site. The SFWMD determined there was a deficiency in the Lennar Homes' proposed mitigation, and accordingly, Lennar Homes integrated that deficiency into their mitigation plan, which was submitted as part of both the Corps and SFWMD permit applications. Given that Lennar Homes sought authorization to construct within the remaining undeveloped acres of the retention area, additional offsite mitigation was required and provided. According to SFWMD correspondence dated April 18, 2008, certain mitigation provided by Lennar Homes was for wetland impacts on the project site. The Corps determined in the Lennar EASOF that wetland impacts from the Lennar Homes project resulted in a loss of 73.87 functional units, that the offsite and onsite mitigation provided 86.14 functional units, and that accordingly, the mitigation associated with the Lennar Homes project Corps permit resulted in a functional gain of 12.27 units. **Specifically, the Lennar EASOF provides that the surplus of 12.27 functional units fully offset any indirect and cumulative impacts to 5.83 acres of man made lakes and ditches. Given that even in the rare circumstance that the indirect and cumulative impacts require 1 to 1 mitigation for the 5.83 acres, the surplus mitigation would still be approximately 6.44 functional units (12.27 - 5.83).** We believe that the Corps has incorrectly applied the 404(b)(1) Guidelines and has ignored evidence that excess mitigation was provided by Lennar Homes for the Lennar Homes project Corps permit, and that accordingly, compensatory mitigation has already been provided for any and all potential wetland impacts on the project site. The Corps, in the LYEC EASOF, provides that based on the Lennar EASOF, "all mitigation"

associated with the Corps' permit for the Lennar Homes project "was required to offset impacts on the Lennar/Centex parcel." This statement is factually inaccurate. ...the Corps and the SFWMD authorizations for the Lennar Homes project require and recognize the mitigation terms of the enforcement action final judgment. The Corps permit for the Lennar Homes project even specifically includes, as Exhibit B to the permit, portions of the SFWMD permit for the Lennar Homes project. ...the Lennar EASOF even specifically provides that the mitigation provided was in excess of the mitigation required to offset wetland impacts. **Given that the mitigation provided pursuant to the Lennar Homes project Corps permit exceeded the required mitigation by providing in excess of between 6.44 and 12.27 functional units, and the fact that the Lennar Homes project Corps permit requires and recognizes the mitigation terms of the enforcement action final judgment, we believe that the Corps' administrative record supports Applicant's assertion that there are excess credits that should apply to and completely cover the required 5.30 functional units necessary to offset the proposed wetland impacts on the project site. [emphasis added]**

The District stated, on pages 7-8 of the EA/SOF,

The Corps sent an e-mail to the applicant on 2 July 2008 indicating that the mitigation accepted by the State for the proposed wetland impacts does not satisfy the requirements of the Clean Water Act, Section 404 (b)(1) guidelines and Federal regulations. The mitigation accepted by the State does not satisfy the Federal requirements because unlike the State, the Corps did not issue a permit for the overall 983.6-acre site, and the impacts proposed for this project have not been previously reviewed by the Corps. The Corps requested that the applicant submit a compensatory mitigation plan that fully offsets the proposed unavoidable impacts. The applicant submitted a response via a letter received on 12 August 2008. The letter re-iterated the applicant's position that no mitigation should be required. The Corps provided a response via letter dated 29 August 2008, requesting that a mitigation proposal be submitted within 30 days. During a conversation on 20 October 2008 between the Corps and the applicant, the Corps explained that the Lennar/Centex mitigation offset impacts associated strictly with development of the Lennar/Centex portion and that only Lennar/Centex can request the Corps re-evaluate the mitigation requirements associated with the permit. To date, no mitigation proposal has been received by the Corps.

The District stated, via a 29 August 2008 letter to the appellant,

The history of the 983.6-acre site is complex, however in previous meetings, telephone conversations, and e-mail correspondence, the Corps has maintained that consistent with legal requirements, compensatory mitigation would be required for unavoidable impacts to aquatic resources as a result of the project. Specifically, in an August 24, 2007 meeting, Mr. Osvaldo Collazo and Mr. Reusch indicated that mitigation would be required for this project and that the previous permits issued by the South Florida Water

Management District (SFWMD) for the overall 983.6-acre site were not sufficient to document that mitigation had already been provided pursuant to Section 404 of the Clean Water Act and the federal regulatory process. This is the same position the Corps maintained during the review of the previously referenced Lennar project which was also part of the 983.6-acre parcel, again previously permitted by the SFWMD, but never permitted by the Corps. There was a discussion during this meeting about the possibility that the Corps permit for the Lennar project may have required excess mitigation that could be used for this project. **However, as previously discussed with you, the Corps Administrative Record for permit number SAJ-2004-1236 indicates no excess mitigation credits remaining after considering all direct, indirect, and cumulative impacts associated with the Lennar portion of the overall parcel.** All mitigation required in the permit was used to offset impacts to jurisdictional waters located within the Lennar/Centex property. Understanding the Corps position, the applicant submitted a mitigation plan on January 25, 2008. For reasons unknown to the Corps, that mitigation plan was eliminated from the proposal contained in the June 8, 2008 response to the RAI. In an e-mail dated July 2, 2008, Mr. Reusch indicated that the applicant had until August 18, 2008 to re-submit a mitigation proposal. This information has not been received to date. Therefore, the Corps is again requesting that a compensatory mitigation plan be provided for impacts associated with the LYEC Three, Inc. project. Please provide this information within 30 days of receipt of this letter. Failure to respond within the 30 days will result in the Corps completing its application review with the information available, which may result in an unfavorable permit decision or deactivation of the file. [emphasis added]

The EA/SOF for the 3 April 2006 permit, issued to Lennar Homes, Inc. and identified as permit number SAJ-2004-1236 (IP-JBH) states (page 4),

....Based upon the fact that the Corps did not previously permit the project site, the Corps has reviewed the entire project site for wetland impacts and the appropriate compensatory mitigation.

The EA/SOF for the 3 April 2006 permit, issued to Lennar Homes, Inc. and identified as permit number SAJ-2004-1236 (IP-JBH) states (page 6),

The impacts result in a functional loss of 73.87 functional units. The offsite and onsite mitigation provide 86.14 function units. This results in a net functional gain of 12.27 functional units. **The surplus of 12.27 functional units fully offset[s] any indirect and cumulative impacts to 5.83 acres of man-made lakes and ditches.** [emphasis added]

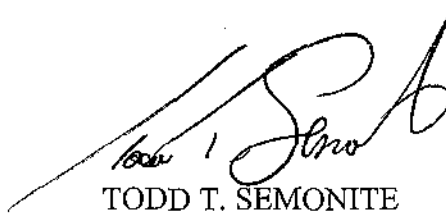
In other words, the "surplus" in functional units of mitigation was used to cover "indirect and cumulative impacts." By Lennar Homes, Inc. signing the 3 April 2006 permit, they agreed with the terms and conditions of the permit; specifically the required mitigation set forth in that permit. In addition, the District provided the EA/SOF to Lennar Homes, Inc. along with the

permit, which outlined that this surplus mitigation was needed to fully offset any indirect and cumulative impacts. There is no indication that Lennar Homes, Inc. disputed the surplus of 12.27 functional units being used to offset any indirect and cumulative impacts to the 5.83 acres of man-made lakes and ditches. As a result, the District clearly explained to the appellant that there was no surplus mitigation for them to use for their project. The District further explained that only Lennar Homes, Inc. could request the District to re-evaluate the mitigation requirements associated with their permit. The appellant chose not to pursue this option with Lennar Homes, Inc. or provide a mitigation proposal that satisfied the Corps requirements for their specific project. As such, the District was justified in denying the appellant's permit request.

Action: None required.

CONCLUSION

For the reasons stated above, I find that the appeal does not have merit. The District's administrative record contains substantial evidence to support its permit denial. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law, regulation, Executive Order, or policy. The administrative appeals process for this action is hereby concluded.

A handwritten signature in black ink, appearing to read "T. Semonite", is written over a large, stylized "S" or "A" shape.

TODD T. SEMONITE
Major General, USA
Commanding