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IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
STATE OF FLORIDA

FRANK H. MOLICA and
LINDA M. MOLICA,

Appellants,

Case No. 5D12-3367

v.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Appellee.

APPENDIX TO APPELLANTS'

REPLY BRIEF

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Molica Property 2006 dor



400 200 0 400 Feet

1:2400



The St. Johns River Water Management District prepares and uses this information for its own purposes and this information may not be suitable for other purposes. This information is provided as is. Further documentation of this data can be obtained by contacting: St. Johns River Water Management District, Geographic Information Systems, Program Management, P.O.Box 1429, 4049 Reid Street Palatka, Florida 32178-1429 Tel: (



FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
COMMISSIONER ADAM H. PUTNAM

January 5, 2012

Mr. Frank Molica
231 N. Courtenay Parkway
Merritt Island, Florida 32953

SUBJECT: **373.406(2) Binding Determination – Frank Molica**

Dear Mr. Molica:

Per your request, enclosed please find our written report on the subject referral. In short, it is the Department's opinion that your operation is engaged in production agriculture. However, all of the activities as detailed in the attached report do not, in our opinion, qualify for the exemption under subsection 373.406(2), Florida Statutes.

If you have any questions as you review the document, please feel free to contact me or Bill Bartnick at 850-617-1700.

Sincerely,

ADAM H. PUTNAM
COMMISSIONER

A handwritten signature in cursive script, appearing to read "R. J. Budell".

Richard J. Budell
Director

Enclosure

cc: Vince Singleton
Carol Forthman

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
Office of Agricultural Water Policy
1203 Governors Square Blvd., Suite 200
Tallahassee, Florida 32301

Binding Recommendation and Opinion
Florida Statute 373.406(2) Exemption Claim
Frank Molica, Brevard County

FDACS Clerk No. A77197

Introduction:

Under s. 373.407, F.S., a water management district or landowner may request that the Florida Department of Agriculture and Consumer Services (FDACS) make a binding determination as to whether an existing or proposed agricultural activity qualifies for a permitting exemption under section 373.406(2), F.S. However, in order for FDACS to conduct a binding determination, all of the following conditions must exist:

- a. There must be a dispute between the landowner and the water management district as to the applicability of the exemption.
- b. The activities in question must be on lands classified as agricultural by the county property appraiser pursuant to s. 193.461, F.S.
- c. The activities in question have not been previously authorized by an environmental resource permit (ERP) or a management and storage of surface water (MSSW) permit issued pursuant to Part IV, Chapter 373, F.S., or by a dredge and fill permit issued pursuant to Chapter 403, F.S.

Frank Molica has requested that FDACS conduct a binding determination on his operation, and the conditions described above are in place. Per this request, FDACS staff has performed a site inspection and evaluated St. Johns River Water Management District (District) provided documentation and additional information received from Molica, and has rendered a conclusion. The basis for that conclusion is provided below.

Background:

The site is a 3.5 acre parcel located in Section 15, Township 24 South, Range 36 East, in Brevard County, north of Courtney Parkway in Merritt Island. The parcel is classified as agriculture (vacant nursery) pursuant to 2011 Brevard County Property Appraiser information. Frank and Linda Molica hold title to the property, and acquired the parcel by warranty deed on February 1, 1990.

Prior Legal Proceedings

This particular parcel has a lengthy legal history. The relevant events are as follows:

December 5, 2007, the Molicas¹ received a letter from the District alleging wetland violations (filling) associated with earthwork activities that occurred in 2004.

¹ The previous legal actions named both Frank H. and Linda M. Molica.

August 8, 2008, the District issued an Administrative Complaint against Molica claiming that beginning in 2004, Molica had taken actions on the property that included dredging in a hardwood swamp wetland and placing fill in that wetland.

September 8, 2008, Molica requested an administrative hearing.

Molica also filed a declaratory judgment action in circuit court claiming the District lacked legal authority to regulate the activities on his property.

March 11, 2009, the administrative hearing was held.

June 12, 2009, the Administrative Law Judge (ALJ) issued a Recommended Order stating that Molica is not entitled to the exemption under ss. 373.406(2).

June, 2009, the Brevard County Circuit Court issued a Final Declaratory Judgment stating that the District lacked authority to take administrative action under ss. 373.406(3).²

August 14, 2009, the District Board remanded the case to the ALJ for findings on the applicability of an exemption under 373.406(3), F.S.

September 21, 2009, the ALJ issued a Supplemental Recommended Order.

August, 19, 2011³, the District Court of Appeal, Fifth District, reversed the circuit court decision, finding that the District did have authority to regulate the activities on Molica's property.

As of the date of this determination, the District has not entered a Final Order. Molica waived the 90 day issuance date so that the Final Order will not be issued until after the Department's determination.

Binding Determination Request

The authority for the Department to issue a binding determination concerning whether an agricultural activity is exempt from Environmental Resource Permitting pursuant to Section 373.406(2), F.S., became effective on July 1, 2011. While previously permitted activities are specifically excluded from the determination process, the statute is silent as to activities subject to Administrative Orders, consent decrees or other non-permit orders. Therefore, without such exclusion, the activity on the Molica property has been considered to qualify for the binding determination process.

OAWP received Mr. Molica's written request for binding determination on November 2, 2011. OAWP received additional information from the District on November 17, 2011; and additional information from Molica on November 22, 2011.

² The exact date is not in the materials available to the Department.

³ The exact date of the mandate from the Fifth District is not known.

Site Inspection Findings:

On November 9, 2011, a site inspection was performed by Bill Bartnick with the OAWP, accompanied by Frank and Linda Molica, and Mr. Brooks Humphrys (retired UF-IFAS extension agent), all representing Molica. During this site inspection, all salient features were observed and digital photos were taken.

Most of the site is used to support a palm tree container nursery operation. The western half is comprised of approximately 120 Queen Palm trees grown in 15-gallon containers on weed cloth ground cover. No irrigation system was noted in this area, reportedly due to poor (saline) water from a now abandoned well. The eastern half is comprised of approximately 50 Sago Palm trees grown in 15-gallon containers on weed cloth ground cover. PVC irrigation risers were noted in this area, allowing for attachment to a standard garden hose which is used to irrigate by hand. A small excavated water supply pond with a 5.5 horsepower motor and pump was noted directly to the east, serving only the Sago Palm production area. Two, 300-gallon cisterns were also noted in this area, but lacked plumbing and served no functional purpose.

Molica stated that they started the nursery business in 2005, after back-to-back 2004 hurricanes destroyed and toppled much of their mature navel citrus grove. The citrus grove dated back to the 1950s and pre-existed their real estate purchase. Reportedly, the hurricanes also toppled many native trees, and Brazilian Peppers (non-native, exotic), in a forested wetland fringe, which is in the central part of the Molica property; and is contiguous to an undisturbed forested wetland that is on the adjacent property directly to the north. According to the District, the functional wetland loss in this area as a result of Molica's earthwork is estimated to be 0.87 acres. At present, much of this remnant forested wetland fringe area is now dominated by an overstory of mature Cabbage Palm trees, mixed with a Brazilian Pepper and Wax Myrtle shrub understory. The groundcover is mostly grass, and the area is not currently being used as a nursery production area.

Using a spade shovel, two holes were dug to a depth of 12-inches in the middle of the forested wetland fringe to determine the level of the water table. One hole was near a Cabbage Palm. Groundwater was encountered at the 12-inch depth. The second hole was in the grass area away from the trees and shrubs. In this hole, mottled soil primarily composed of sand and shell material, but no groundwater, was noted at the 12-inch depth. When asked about this, Molica replied that some fill was brought in to fill in the large holes that remained when the Brazilian Pepper trees were removed as a function of the hurricane clean-up operation.

No ditches were noted within the property, only existing perimeter ditches along the south and east property boundary lines. Standing water was observed in these ditches, as were emergent aquatic plants. A small berm (approximately one-foot in height) was observed on Molica's property, adjacent to the south, east and north property boundary lines. Molica advised that the berm was recently installed in order to conform to the exemption under ss. 373.406(3), F.S., for a closed agricultural system. That particular

exemption is outside the Department's authority to make a binding determination which extends only to the exemption pursuant to 373.406(2), F.S. The berm material was placed in jurisdictional wetlands.

Statutory Analysis:

(a) *"Is the person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture on lands classified as agricultural pursuant to s. 193.461, F.S.?"*

YES. The OAWP finds that Molica is engaged in the practice of agriculture on the subject parcel. The county has found that the property qualifies for classification as a bona fide agricultural use pursuant to s. 193.461 F.S., continuously since the Molicas purchased the property in 1990.

Based on aerial photo-interpretation, the citrus trees that were on the property in the 1990s remained mostly intact until the year 2006. In 2006 photographs, the citrus trees on the western side of the property were gone and replaced with container nursery stock. During this same time period, stockpiled soil, but no nursery stock, existed on the eastern side of the property. At some point between the initial earthwork (April 15, 2004 photographs taken by adjacent property owner) and 2006, Molica began systematically replacing his citrus grove with container-grown palm trees. This change in agricultural land use was according to Molica due to hurricane damage and/or unproductive citrus trees in varying states of decline. This was corroborated by former Extension Agent Brooks Humphrys during the site visit.

Photos produced by Molica show that the nursery had an assortment of palm tree varieties; namely, Sago, Foxtail, Majesty, and Christmas palms. The Molicas reported that they suffered a near catastrophic loss to their nursery stock as a result of freeze events over the last few years. This was corroborated with data supplied by the National Weather Service Forecast Office in Melbourne, Florida. Based on data from their nearest station in Titusville (TITFI), there were no fewer than five (5) freeze events with minimum recorded temperatures at or below 32°F between January 2009 and January 2011. According to Dr. Tim Broschat with the UF-IFAS Ft. Lauderdale Research Center, the typical grow-out period for these varieties of palm trees (especially Foxtail and Queen) cultivated in 15-gallon pots is 4 to 5 years. The combination of Dr. Broschat's estimated grow-out period and the aforementioned documented freeze events leads the Department to conclude that the freeze destroyed most of their trees before they reached the typical market size for sale. Hence, no commercial sales records exist for the nursery to date. The Molica nursery is not currently registered with the Department's Division of Plant Industry per nursery inspection law requirements. It would need to do so before generating any commercial sales.

Based on these factors, OAWP has determined that the growing of the palm trees is agriculture and therefore Molica is engaged in the occupation of agriculture.

(b) *"Has the individual altered (or proposed to alter) the topography of the tract of land for the purposes consistent with the normal and customary practice of such occupation in the area?"*

YES (for that part of the property from North Tropical Trail to the easternmost extent of the forested wetland fringe). The OAWP finds that the filling of holes that were left by the removal of the Brazilian Pepper and/or citrus trees and residual leveling, after the hurricanes, would qualify as a normal and customary practice in this instance. Most of the dominant species which form the tree canopy within the forested wetland fringe have been left intact.

NO (for the remaining part of the property). The OAWP finds that the importation of fill material into a jurisdictional wetland, coupled with nursery production activities, is not a normal and customary practice.

c) *"Are the alteration(s) (or proposed alterations) for the sole and predominant purpose of impeding or diverting surface waters or adversely impacting wetlands?"*

NO. As to the re-filling of holes for removed trees. All activities associated with tree removal, leveling and filling were not for the sole and predominant purpose of impeding or diverting surface waters or adversely impacting wetlands.

YES. As to the placement of fill for a berm. The installation of the berm along the northern property boundary is for the sole and predominant purpose of impeding surface waters; however, it can easily be corrected by removing the berm material in wetlands and placing it in a suitable upland site.

Conclusion:

OAWP has determined that the incidental earthwork in the forested wetland fringe within the central part of the Molica property is exempt under subsection 373.406(2), F.S. The earthwork and nursery production area west of the forested wetland fringe; and installation of the berm are not exempt under subsection 373.406(2), F.S.

Nothing herein relieves the landowner from applying for and obtaining any applicable federal, state, or local authorization.

A determination by the Department that an activity is not exempt from permitting does not preclude the landowner and the water management district from agreeing to modifications to the activity that would render it exempt.

Right to Administrative Hearing:

If you wish to contest OAWP's action, you have the right to request an administrative hearing to be conducted in accordance with Sections 120.569 and 120.57, Florida Statutes, and to be represented by counsel or other qualified representative. Mediation is not available. Your request for hearing must contain:

1. Your name, address, and telephone number, and facsimile number (if any).
2. The name, address, telephone number, and facsimile number of your attorney or qualified representative (if any) upon whom service of pleadings and other papers shall be made.
3. A statement that you are requesting an administrative hearing and dispute the material facts alleged by OAWP, in which case you must identify the material facts that are in dispute (formal hearing), or that you request an administrative hearing and that you do not dispute the facts alleged by the OAWP (informal hearing).
4. A statement of when (date) you received this Notice and the file number of this Notice.

Your request for a hearing must be received at the address shown on this Notice within twenty-one (21) days of receipt of this Notice. If you fail to obtain a Release from this Notice or fail to request an administrative hearing within the twenty-one (21) day deadline you waive your right to a hearing and the binding determination will become final agency action upon filing with the agency clerk.

You may appeal the final agency action by filing: (1) a Notice of Appeal with the OAWP at the address shown in this Notice, and (2) a copy of the Notice of Appeal with the applicable district court along with the filing fee within 30 days of the action becoming final.

Supporting Documents:

- 1) 2011 Brevard County Property Appraiser Information
- 2) Site Visit Digital Photographs
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Filed with the Agency Clerk and rendered this 5th day of January, 201~~1~~².



Paul Palmiotto, Agency Clerk

**FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
Office of Agricultural Water Policy
1203 Governors Square Blvd., Suite 200
Tallahassee, Florida 32301**

**Binding Recommendation and Opinion
Florida Statute 373.406(2) Exemption Claim
Frank Molica, Brevard County**

FDACS Clerk No. A77197

CORRECTED ORDER – The original binding determination contained a clerical error designating an area as in the west of the property when it was in the east. In addition, a map detailing the exempt and non-exempt areas has been attached to clarify the areas in question.

Introduction:

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No ditches were noted within the property, only existing perimeter ditches along the south and east property boundary lines. Standing water was observed in these ditches,

as were emergent aquatic plants. A small berm (approximately one-foot in height) was observed on Molica's property, adjacent to the south, east and north property boundary lines. Molica advised that the berm was recently installed in order to conform to the exemption under ss. 373.406(3), F.S., for a closed agricultural system. That particular exemption is outside the Department's authority to make a binding determination which extends only to the exemption pursuant to 373.406(2), F.S. The berm material was placed in jurisdictional wetlands.

Statutory Analysis:

(a) *"Is the person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture on lands classified as agricultural pursuant to s. 193.461, F.S.?"*

YES. The OAWP finds that Molica is engaged in the practice of agriculture on the subject parcel. The county has found that the property qualifies for classification as a bona fide agricultural use pursuant to s. 193.461 F.S., continuously since the Molicas purchased the property in 1990.

Based on aerial photo-interpretation, the citrus trees that were on the property in the 1990s remained mostly intact until the year 2006. In 2006 photographs, the citrus trees on the western side of the property were gone and replaced with container nursery stock. During this same time period, stockpiled soil, but no nursery stock, existed on the eastern side of the property. At some point between the initial earthwork (April 15, 2004 photographs taken by adjacent property owner) and 2006, Molica began systematically replacing his citrus grove with container-grown palm trees. This change in agricultural land use was according to Molica due to hurricane damage and/or unproductive citrus trees in varying states of decline. This was corroborated by former Extension Agent Brooks Humphrys during the site visit.

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Based on these factors, OAWP has determined that the growing of the palm trees is agriculture and therefore Molica is engaged in the occupation of agriculture.

(b) *"Has the individual altered (or proposed to alter) the topography of the tract of land for the purposes consistent with the normal and customary practice of such occupation in the area?"*

YES (for that part of the property from North Tropical Trail to the easternmost extent of the forested wetland fringe). The OAWP finds that the filling of holes that were left by the removal of the Brazilian Pepper and/or citrus trees and residual leveling, after the hurricanes, would qualify as a normal and customary practice in this instance. Most of the dominant species which form the tree canopy within the forested wetland fringe have been left intact. (See map, Exhibit 1)

NO (for the remaining part of the property). The OAWP finds that the importation of fill material into a jurisdictional wetland, coupled with nursery production activities, is not a normal and customary practice.

c) *"Are the alteration(s) (or proposed alterations) for the sole and predominant purpose of impeding or diverting surface waters or adversely impacting wetlands?"*

NO. As to the re-filling of holes for removed trees. All activities associated with tree removal, leveling and filling were not for the sole and predominant purpose of impeding or diverting surface waters or adversely impacting wetlands.

YES. As to the placement of fill for a berm. The installation of the berm along the northern property boundary is for the sole and predominant purpose of impeding surface waters; however, it can easily be corrected by removing the berm material in wetlands and placing it in a suitable upland site.

Conclusion:

OAWP has determined that the incidental earthwork in the forested wetland fringe within the central part of the Molica property is exempt under subsection 373.406(2), F.S. The earthwork and nursery production area east of the forested wetland fringe; and installation of the berm are not exempt under subsection 373.406(2), F.S.

Nothing herein relieves the landowner from applying for and obtaining any applicable federal, state, or local authorization.

A determination by the Department that an activity is not exempt from permitting does not preclude the landowner and the water management district from agreeing to modifications to the activity that would render it exempt.

Right to Administrative Hearing:

If you wish to contest OAWP's corrective action, you have the right to request an administrative hearing to be conducted in accordance with Sections 120.569 and 120.57, Florida Statutes, and to be represented by counsel or other qualified representative. Mediation is not available. Your request for hearing must contain:

1. Your name, address, and telephone number, and facsimile number (if any).
2. The name, address, telephone number, and facsimile number of your attorney or qualified representative (if any) upon whom service of pleadings and other papers shall be made.
3. A statement that you are requesting an administrative hearing and dispute the material facts alleged by OAWP, in which case you must identify the material facts that are in dispute (formal hearing), or that you request an administrative hearing and that you do not dispute the facts alleged by the OAWP (informal hearing).
4. A statement of when (date) you received this Notice and the file number of this Notice.

Your request for a hearing must be received at the address shown on this Notice within twenty-one (21) days of receipt of this Notice. If you fail to obtain a Release from this Notice or fail to request an administrative hearing within the twenty-one (21) day deadline you waive your right to a hearing and the binding determination will become final agency action upon filing with the agency clerk.

You may appeal the final agency action by filing: (1) a Notice of Appeal with the OAWP at the address shown in this Notice, and (2) a copy of the Notice of Appeal with the applicable district court along with the filing fee within 30 days of the action becoming final.

Supporting Documents:

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Filed with the Agency Clerk and rendered this 8th day of May, 2012.


Paul Palmiotto, Agency Clerk

A	0.1
B	0.1
C	0.1
D	1.1

Exempt and Non-Exempt areas on Molica Property noted on STRWHD provided 2009 color aerial

Exempt
Non-Exempt

Bill Bartnick
2/12/12





A

B

C

D

16

HIBIT 1

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GOVERNING BOARD OF
THE ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Petitioner,

vs.

Case No.: 08-4359

FRANK H. MOLICA and
LINDA M. MOLICA his wife
Respondents.

RESPONDENTS' PRE-HEARING STATEMENT

1. NATURE OF CONTROVERSY

This case involves an administrative complaint served on the Respondents' pursuant to section 373.119, Fla. Stat., wherein it is alleged that the Respondents' dredged and filled in a hardwood swamp wetland on their property without first having been issued a permit by the District pursuant to Chapter 373, Part IV, Fla. Stat. The Respondents' deny the allegations of the administrative complaint.

2. STATEMENT OF PARTIES POSITIONS

Respondents' Position:

- 1) That since the Respondents have owned their land there has been no hardwood swamp or wetland on it in the area where Petitioner claims there to be.
- 2) That the Respondents' activities and use of their land since 1990 when they purchased it has been for exempted agricultural use, initially citrus and now palm production.
- 3) That Respondents' property does not come within the permitting provisions of Chapter 373, Part IV, F.S. and if it does, it would be exempt according to that Part.
- 4) That the issues in this matter were previously resolved.

5) That the Petitioner should be equitably estopped from proceeding in this matter as it expressly or impliedly acquiesced in Respondents use of their land for farming activities, and the respondents relied thereon.

3. **LIST OF EXHIBITS**

- ✓1. Photographs of subject property.
- ✓2. Correspondence between Respondent, State of Florida DEP, and SJRWMD.
3. Documents pertaining to Department of Agriculture Best Management Practices.
4. Brevard County Code Enforcement Statement Of Violation and Order of dismissal.
5. Receipts for farming activities and expenses.
- ✓6. Exhibits used by Respondents' experts for testimony at final hearing.
7. Deposition of Rich Szpyrka, PE, taken on February 19, 2009.
8. Memorandum of agreement pursuant to sec. 373.407, F.S.
9. A manual of Reference Management Practices For Agricultural Activities.
10. All Documents previously produced by the parties.
11. Palm Farm Research.
12. Video and photos of property and property inspection by SJRWMD.
13. Impeachment exhibits.

4. **LIST OF WITNESSES**

1. Vance Kidder, Esq.
St. Johns River Water Management District
4049 Reid Street
Palatka, FL 32177
2. Rich Szpyrka, Expert (deposition)
2725 Fran Jamieson Way
Viera, Florida

3. Brooks Humphrys, Expert
5060 Saturday Pl.
Cocoa, FL 32922
4. James Crisafulli
2310 S. Fisk Blvd.
Rockledge, FL 32955
5. Philip Molica, Expert
255 Needle Blvd.
Merritt Island, FL 32953
6. Richard Kern, Expert
385 Pineda Court
Melbourne, FL
7. Gregory J. Sawka, Expert
Southeast Soil & Environmental, Inc.
4511 S. Indian River Dr.
Ft. Pierce, FL 34982
8. Shane Lyons
Transportation Engineering Dept.
2725 Judge Fran Jamieson Way
Viera, FL 32940
9. Respondents
10. Jon Shepard, Expert
500 N. Harbor City Blvd., Suite 1
Melbourne, FL 32935
11. Records Custodian
Brevard County Property Appraisers
County Government Center
Titusville, FL
12. Impeachment witness

1. **STATEMENT OF ADMITTED FACTS AND AGREED ISSUES**

None known at this time.

1. **ISSUES OF FACT AND LAW WHICH REMAIN TO BE LITIGATED**

- (a) Whether there was a hardwood swamp on Respondents' property.

- (b) Whether Respondents did anything on their property which required them to obtain a permit under Chapter 373, Part IV, Florida Statutes.
 - (1) Whether Respondents' property is controlled by Chapter 373, Part IV, F.S.
 - (2) Whether the exemptions in section 373.406, F.S., are applicable to Respondents activities on their land.
- (c) Whether the issues being raised by Petitioner were previously resolved.
- (d) Whether the Petitioner should be estopped from proceeding in this matter due to their previous express or implied acquiescence to Respondents' farming activities on their land, upon which the Respondents relied.
- (e) Whether Petitioner is exceeding its statutory permitting authority.

7. **APPLICATIONS OF RULES OF EVIDENCE**

There are no known disagreements at this time.

8. **PENDING MOTIONS OR OTHER MATTERS**

Respondents' Motion To Strike Alternatively Motion For Protective Order, served February 18, 2009.

The value under UMAM is not an issue or relevant for this Hearing.

9. **ESTIMATE OF HEARING TIME**

Respondents estimate the length of hearing time to be three to four days.

I HEREBY CERTIFY a true copy of the foregoing has been furnished by mail this 4th day of March, 2009, to *Vance Kidder, Esq. St. Johns River Water Management District, 4049 Reid Street, Palatka, Florida 32177.*



FRANK HENRY MOLICA, P.A.
Frank Henry Molica, Esquire
Florida Bar No. 120022
231 N. Courtenay Pkwy,
Merritt Island, FL 32953
Telephone No. 321/452-4455
Attorney for the Respondents

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Petitioner,

vs.

FRANK H. AND LINDA M. MOLICA,

Respondents.

Case No. 08-4359EF

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on March 11, 12, and 13, 2009, in Merritt Island and Rockledge, Florida.

APPEARANCES

For Petitioner: Vance W. Kidder, Esquire
St. Johns River Water Management District
Post Office Box 1429
Palatka, Florida 32178-1429

For Respondents: Frank Henry Molica, Esquire
Frank Henry Molica, P.A.
231 North Courtenay Parkway
Merritt Island, Florida 32953-3407

Benjamin Y. Saxon, II, Esquire
Saxon & Chakhtoura, P.A.
111 South Scott Street
Melbourne, Florida 32901-1262

STATEMENT OF THE ISSUES

The issues are (1) whether Respondents, Frank H. and Linda M. Molica, dredged and filled wetlands on their property in

Merritt Island, Brevard County (County), Florida, without a permit and should take certain corrective actions, and (2) whether Respondents' activities are exempt from permitting under Section 373.406(2), Florida Statutes.¹

PRELIMINARY STATEMENT

On August 8, 2008, Petitioner, St. Johns River Water Management District (District), filed an Administrative Complaint and Proposed Order (Complaint) alleging that "[b]eginning in 2004," Respondents "undertook land clearing, dredging, and filling in the wetland on [their] property without having a current, valid permit from the District"; and that these activities constituted "the construction and operation of a surface water management system and are prohibited unless authorized by a permit issued by the District." The Complaint further described a series of corrective actions that must be undertaken by Respondents, including the option of applying for an after-the-fact permit or restoring the subject property to a condition commensurate with the adjacent wetland system. By an ore tenus motion at final hearing, on which a ruling was reserved, the proposed corrective actions were slightly revised and are reflected in District Exhibit 73. The motion is hereby granted.

On August 25, 2008, Respondents filed their Petition for the purpose of contesting the charges in the Complaint. The Petition generally contended that Respondents were not required to obtain

a permit since their activities qualify for an agricultural exemption under Section 373.406(2), Florida Statutes. The matter was referred by the District to the Division of Administrative Hearings on September 3, 2008, with a request that an administrative law judge be assigned to conduct a hearing. On September 25, 2008, Respondents filed an Amended Petition, which sets out in greater detail the bases for their asserting that they were entitled to an agricultural exemption.

By Notice of Hearing dated September 11, 2008, a final hearing was scheduled on December 16 and 17, 2008, in Cocoa, Florida. On December 1, 2008, Respondents filed an unopposed Motion to Continue Hearing. The final hearing was then rescheduled to March 11 and 12, 2009, in Merritt Island and Rockledge, Florida, respectively. A continued hearing was conducted on March 13, 2009, in Merritt Island, Florida.

Numerous procedural and discovery disputes arose during the course of this proceeding and the rulings on those matters are found in various orders issued in this case.

The parties filed separate Pre-Hearing Statements, as revised, on March 4, 2009. In their filing, Respondents specifically asserted for the first time that "there has been no hardwood swamp or wetland on [the property] in the area where Petitioner claims there to be." At the final hearing, the District presented the testimony of Rita Strickland, who resides near Respondents' property; Frank Henry Molica; Mark E. Crosby,

an Engineer III in the Department of Water Resources and accepted as an expert; Elois S. Lindsey, a Regulatory Scientist II and accepted as an expert; Travis C. Richardson, a Soil Scientist with the Division of Environmental Resource Management and accepted as an expert; Bryan West, an Environmental Specialist II with the Department of Environmental Protection (DEP) and accepted as an expert; Mykal Kwami Pinnick, a former Brevard County biologist and accepted as an expert; and Lance D. Hart, Manager of Technical Programs and accepted as an expert. Also, it offered District Exhibits 1-6, 8-10, 12-15, 22, 45, 47-50, 52, 57, 62-67, and 73, which were received in evidence. Respondents presented the testimony of Philip Molica, a professional land surveyor and accepted as an expert; Richard Kern, a professional engineer and accepted as an expert; Gregory J. Sawka, a soil consultant and accepted as an expert; and Brooks Humphreys, an agronomist and accepted as an expert. Also, they offered Respondents' Exhibits 1, 2A and B, 3A-F, 4, 5A-K, 6, 7, 9, 10, 12A-C, 14, 16A-D, and 17-22. All were received except Exhibit 7, the deposition of Richard Szpyrka, County Land Development Engineer, upon which a ruling was reserved. The objection is overruled and the exhibit is received. Finally, the undersigned granted Motions for Official Recognition by both parties.²

The Transcript of the hearing (five volumes) was filed on April 24, 2009. At hearing, the parties agreed that proposed recommended orders would be due within thirty days after the

filing of the transcript. Proposed Orders were timely filed, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

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

A. Background

1. In 1990, Respondents purchased a 3.47-acre, rectangular-shaped parcel at 2050 North Tropical Trail, Merritt Island, Florida, which is located within the regulatory jurisdiction of the District. See § 373.069, Fla. Stat. The parcel identification number is 24-36-15-00-00764-00000.00. The property is less than a mile south of State Road 528 (A1A), approximately one-half mile west of State Road 3 (North Courtney Parkway), and around one-half mile east of the Indian River.
2. The property is bounded on its western side by a roadway known as North Tropical Trail, on the south side by a drainage ditch, and on the east side by another drainage ditch. Further to the east of the drainage ditch on the eastern side of the property are a holding pond and a subdivision known as Copperfield Subdivision developed in 1993, while a nursery is located just south of the drainage ditch on the southern side. The northern boundary of the parcel is five hundred twenty feet long and is adjoined by a vacant parcel of land similar in size to the Molica parcel and which is owned by the Lacanos. The

Lacano property is largely a wetland. To the north of the Lacano property is a parcel owned by the Stricklands. Historically, the natural flow of water in the area was north to south, that is, from the Stricklands to the Lacanos to the Molica's property, and then to the drainage ditch on the south side of the Molica's property.

3. When Respondents purchased the property in 1990, citrus trees were located "mostly in the front half," or western side of the property, "but they were also located in the rear scattered throughout." There was also "weed grass" or "mini grass" throughout the entire parcel.

4. In 2002 or 2003, the citrus industry was economically hurt by a drop in prices due to various problems, and it became difficult to find fruit pickers or purchasers for the fruit. Because of these conditions, and pursuant to a recommendation by another citrus grower, Respondents state that they began to "transform their property to palm tree production."

5. In late 2003, Respondents began removing orange trees and clearing the land; this continued throughout 2004. At the same time, they began to remove vegetation from the eastern half of the property, which included the excavation of the vegetation, soil, and roots. This was accomplished by the use of heavy equipment, including a tracked cab with hoe, a bobcat with front end loader bucket and root rake, and a wheeled tractor with front end root rake. This is confirmed by photographs taken of the

property in April and December 2004. See District Exhibits 8 through 10. Also, a few cabbage palms were removed that were damaged during the clearing process, as well as trees damaged by hurricanes that struck the east coast of Florida in 2004. The vegetation and soil were trucked off-site for disposal, and new soil or fill was placed throughout the eastern half of the property in which vegetation and soil had been excavated. In some cases, the fill measured as high as thirty-three inches but averaged around one foot in height. There is no dispute that dredging (or excavation) and filling on the property occurred. Respondents did not obtain an Environmental Resource Permit (ERP) before performing this work.

6. On December 13, 2004, the County received a complaint (generated by Mrs. Strickland, the neighbor to the north) about "heavy machinery operating in a wetland" on the Molica property. Mr. Pinnick, who was charged with enforcement of County environmental ordinances, visited the subject property to determine whether a violation of an ordinance had occurred. He observed heavy machinery operating on the central and eastern sides of the property and took several photographs of the site. See District Exhibit 12. He also observed vegetation and muck soil in the disturbed area and standing water in the ditch to the south and concluded that wetlands were being impacted. It is fair to infer that he then notified the DEP about the incident.

7. On December 15, 2004, Mr. Pinnick, accompanied by two DEP employees, Mr. West and his supervisor, Ms. Booker, visited the site and met Mr. Molica and his consultant. At that time, "clearing and [dredging and filling] of wetland at rear [or east end] of Molica's property [was observed]." See District Exhibit 49. The DEP requested that Respondents' consultant "flag a [wetland] line and then Molica have all fill within wetland area removed." The DEP also advised Mr. Molica that "[a]rea then needs to be restored to natural grade." Id. Notes taken by Mr. Pinnick confirm that Mr. Molica agreed to remove the fill "to restore the natural grade and the wetland boundary would be delineated [by Mr. Molica's consultant.]" See District Exhibit 52. The conclusion of both the County and DEP was that wetlands were present in the central part of the property. No formal delineation of wetlands was performed by them since the parties reached an understanding that Mr. Molica's consultant would perform this task. Because Mr. Molica thereafter denied access to the property, this would be the last time regulatory personnel were able to make an on-site inspection of the property until October 2008, when the District obtained an Order authorizing them to inspect the property.

8. The County later charged Respondents with violating the County Code ("prohibitions in functional wetlands"), and the matter was considered by a Special Magistrate. An Order of Dismissal was entered by the Special Magistrate on February 1,

2006, on the grounds the property was zoned agriculture and enjoyed an agricultural exemption, and Respondents agreed to use Best Management Practices, as prescribed by the Department of Agriculture and Consumer Affairs. See Respondents' Exhibit 4. However, neither the DEP nor the District was involved in that action, and the matter concerned an alleged violation of a local ordinance, and not a provision in Chapters 373 or 403, Florida Statutes.

9. At some point in time, but presumably after the site visit in December 2004, Mr. Molica asserted to the DEP that he was conducting an agricultural operation. In early 2005, the DEP referred the matter to the District since the two agencies have an operating agreement concerning which agency will handle certain types of permitting and enforcement matters. By letter dated August 15, 2005, Mr. Molica advised the local District office in Palm Bay, Florida, that the owners of the property were engaging in agricultural activities and denied that any unauthorized fill and excavation activities had occurred. He also requested copies of any statutes, rules, or case law that supported the District's position. See Respondents' Exhibit 2A. On August 3, 2007, the District advised Mr. Molica by letter that it had received a complaint from DEP, that the matter had not yet been resolved, and that it wished to inspect his property to determine if unauthorized fill and excavation activities had occurred. See Respondents' Exhibit 2B. According to a District

witness, the delay in responding to Mr. Molica's letter was caused by the building boom occurring in 2005 and 2006, which required action on numerous pending permits, and in-house confusion over whether the DEP or District had jurisdiction to handle the complaint. There is no evidence to suggest that at any time the District agreed that the activities were lawful, or that the delay in responding to Mr. Molica's letter prejudiced Respondents in any manner.

10. After conducting a preliminary investigation, which included a review of aerial photographs of the area, wetland maps, and soil maps, a visual inspection taken from the Copperfield Subdivision to the east and North Tropical Trail from the west, and a flyover of the property, the District issued its Complaint on August 8, 2008.

B. Are there wetlands on the property?

11. To determine whether wetlands were present on the Molica property, the District made a site inspection on October 22, 28, 29, and 30, 2008. Besides making a visual inspection of the property, the staff took photographs, performed twenty-nine soil borings on both the Molica and Lacano properties, reviewed soil surveys for the area, completed one west-to-east transect and five north-to-south transects to determine locations of hydric soils and any fill materials, and observed lichen and water stain lines on trees. The locations of the various soil borings are depicted on District Exhibit 22.

Finally, the staff examined a series of aerial photographs of the property.

12. Under the wetland delineation rule, three different indicators are used to make that determination: vegetation; soils; and signs of hydrology. See Fla. Admin. Code R. 62-340.300(2)(a)-(d). In addition, where the vegetation and soil have been altered by man-induced factors so that the boundary between the uplands and wetlands cannot be delineated by use of Rule 62-340.300(2), such a determination shall be made by using the most reliable information and "reasonable scientific judgment." See Fla. Admin. Code R. 62-340.300(3)(a). The parties presented conflicting evidence on the wetland issue; the District's evidence has been accepted as being the more persuasive and credible and supports a finding that the areas where dredging and filling occurred in the eastern and central parts of the property meet the test for a wetland.

a. Wetland Soils

13. Muck presence is a hydric soil indicator and also a wetland indicator. The District's expert, Mr. Richardson, established that the soil on the property where the dredging and filling occurred was hydric in nature, and therefore indicative of a wetland. Although Respondent's soil expert disagreed with this conclusion, he generally agreed with Mr. Richardson's methodology, and he agreed that muck was present below the fill material.

b. Wetland Vegetation

14. The presence or absence of wetland vegetation is another factor to consider in deciding whether an area is or was a wetland. Wetland hardwood trees, and not grass planted on top of the fill, are more appropriate for evaluating whether the area in which the trees are located was a wetland. Large trees, estimated to be fifty to sixty years old, remain on the property in the vicinity of certain District soil borings. They include boring 20 (swamp tupelo); borings 3, 4, and 5 (red maple, American elm, and holly); and borings 9 and 10 (maple and American elm). These are all wetland canopy species and provide further support for the District's position.

c. Hydrologic Indicators

15. Algal matting is found on the surface of the property in the vicinity of borings 3, 4, 5, 8, and 9. Algal matting occurs because water has inundated the surface of the ground sufficiently long for algae to grow in the water and then remains on the ground surface after the water no longer covers the ground. Rainfall alone does not produce algal mats.

16. Trees on the property provided evidence of being in saturated or inundated soil conditions through the morphological adaptation of buttressing and adventitious roots, particularly in the vicinity of District borings 20, 8, 9, and 10. Also, the trees had lichen lines on them, which are indicators of seasonal high water inundation elevations in wetlands.

17. The presence of muck soils is a hydrologic indicator. As noted above, the District determined through soil borings that muck was under the fill that had been placed on the property.

d. Reasonable Scientific Judgment

18. The evidence established that there was significant alteration to the soils and vegetation across the central and eastern parts of the subject property due to man-induced factors of vegetation removal, dredging, and filling. Through consideration of the most reliable information available, including aerial photographs, the remaining trees on the site, hydrologic indicators, the presence of hydric soils, coupled with reasonable scientific judgment, the evidence established that the areas where the recent dredging and filling occurred met the wetland delineation test in Florida Administrative Code Rule 62-340.300(3).

C. Agricultural Exemption

19. Mr. Molica is a full-time practicing attorney. His wife is his legal secretary. Respondents contend that since they purchased the property in 1990, they have been continuously engaged first in the occupation of citrus farming, and then beginning sometime in 2004 in the production of palm trees. Therefore, they assert they are entitled to the exemption provided under Section 373.406(2), Florida Statutes. That provision states in relevant part that "[n]othing herein . . . shall be construed to affect the right of any person engaged in

the occupation of . . . horticulture . . . to alter the topography of any tract of land consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters." The parties agree that the burden of proving entitlement to this exemption rests on Respondents.

20. When the property was purchased in 1990, there were citrus trees on the land, mainly in the western half. A few navel oranges were later added, and some citrus trees were removed at that time. Beginning at the end of 2003, and continuing in 2004, the citrus trees were removed. At the time of the DEP inspection in December 2004, no potted palm trees were observed on the property. The precise date when they were first placed on the property is not clear. Photographs taken in January 2006, more than a year after the dredging and filling and just before the County code violation charge was resolved, reflect around fifty or so small trees in pots located in a small, cleared section of the property. See Respondents' Exhibit 18. Photographs taken three years later (January 2009), long after the dredging and filling occurred, show a comparable number of small palm trees in pots placed on what appears to be the same part of the property. See Respondents' Exhibit 21. Mr. Molica also submitted numerous documents (dated 2005 and later) downloaded from the internet by his wife which pertain to palm trees, see Respondents' Exhibit 20; and he stated that a

marketing plan for the sale of palm trees has been developed, which was simply a goal of selling the trees after they were ten years old. He further stated that he intends to work the "farm" as a business full-time after retiring from his law practice. Finally, he presented the testimony of an agronomist who stated that clearing property, filling holes, smoothing land, and building an access road are normal agriculture activities.

21. It is fair to infer from the record that Respondents' activities can be characterized as an avocation, not an occupation. Notably, there is no evidence that since they purchased the property in 1990, Respondents have sold any citrus fruit or a single palm tree.

22. There is no evidence that dredging and filling in wetlands is a normal agriculture practice, or that it is consistent with the practice of horticulture, including the growing of exotic palm trees. Mr. Molica's agronomist acknowledged that he has never been associated with an application to conduct agricultural or horticultural activities that involve the filling of wetlands. Moreover, extensive dredging, filling, and removal of vegetation were not necessary to accommodate the small area on which the potted plants sit. The more persuasive evidence supports a finding that the topographic alterations on the property are not consistent with the practice of agriculture.

23. The evidence shows that the filling on the property has obstructed the natural flow of surface water. More than likely, the filling of the wetlands was for the predominant purpose of obstructing and diverting surface water that flowed south from the Lacano property, and not for the purpose of enhancing horticultural productivity.

D. Corrective Actions

24. At hearing, the District submitted certain revisions to the proposed corrective action, which are described in District Exhibit 73. The revisions provide greater specificity regarding the formulation of a restoration plan and who must be involved in formulating that plan. In general terms, the corrective action offers Respondents the option of seeking an after-the-fact permit or restoring the wetlands. Respondents offered no proof at hearing that the original or revised corrective action is unreasonable. The revised corrective action is found to be reasonable and designed to address the restoration needs of the property and is hereby approved.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

26. Section 373.119(1), Florida Statutes, authorizes the District to issue a complaint when it has reason to believe that

a violation of any provision of Chapter 373, Florida Statutes, or a District rule has occurred.

27. Florida Administrative Code Rule 40C-4.041(2)(b)8. requires that an ERP be obtained "prior to the construction . . . [or] operation of a surface water management system which . . . is wholly or partially located in, on, or over any wetland." The term "construction" is defined in Florida Administrative Code Rule 40C-4.021(7) to mean "any activity including land clearing [or] earth moving . . . which will result in the creation of a system." The term "operation" means "to cause or to allow a system to function." See § 2.0(11), Applicant's Handbook. Florida Administrative Code Rule 40C-4.021(27) defines the terms "surface water management system" or "system" to include areas of dredging and filling wetlands. Therefore, if the area in which Respondents dredged and filled was a wetland, this activity constituted the construction and operation of a surface water management system requiring an ERP.

28. For the reasons previously found, the more credible and persuasive evidence supports a conclusion that Respondents dredged and filled wetlands on their property without first obtaining an ERP. Therefore, the charge in the Complaint has been sustained.

29. Respondents claim they are entitled to an agricultural exemption under Section 373.406(2), Florida Statutes. An exemption is strictly and narrowly construed against the person

claiming the exemption. See, e.g., Pal-Mar Water Management District v. Board of County Commissioners of Martin County, et al., 384 So. 2d 232, 233 (Fla. 4th DCA 1980). Under the statute, three issues must be evaluated in order to determine if an activity qualifies for an exemption. First, Respondents must be engaged in the occupation of agriculture or horticulture. Second, the topographic alteration must be consistent with the practice of agriculture. Finally, the alteration must not be for the sole or predominant purpose of impounding or obstructing surface waters.

30. The more persuasive evidence supports a conclusion that Respondents are not engaged in the occupation of palm tree production; that the topographic alterations are not consistent with the practice of agriculture; and that the alterations on the property were for the sole or predominant purpose of impounding or obstructing surface waters. Therefore, they are not entitled to an exemption.

31. Finally, Respondents cite the recent case of A. Duda and Sons, Inc. v. St. Johns River Water Management District, 34 Fla. L. Weekly D972 (5th DCA, May 15, 2009), for the proposition that if the predominant effect of their agricultural activity has a purpose consistent with the practice of agriculture, then the activity is exempt from the District's permitting requirements even if that activity has more than an incidental effect of impounding or obstructing surface waters. As previously found,

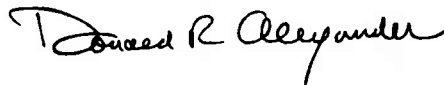
however, the predominant purpose of the dredging and filling was not to enhance agricultural or horticultural productivity, but rather to obstruct the surface water runoff from the upgradient properties. Given this factual record, the Duda case does not mandate a different result.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered sustaining the charges in the Complaint, requiring Respondents to take the corrective actions described in District Exhibit 73, and determining that Respondents are not entitled to an agricultural exemption under Section 373.406(2), Florida Statutes.

DONE AND RECOMMENDED this 12th day of June, 2009, in Tallahassee, Leon County, Florida.



DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of June, 2009.

ENDNOTES

1/ All statutory references are to the 2008 version of the Florida Statutes.

2/ The officially recognized matters include Chapters 373 and 403, Florida Statutes (2007); Florida Administrative Code Rule Chapters 40C-4, 62-345, and 62-340; St Johns River Water Management District Applicant's Handbook for Management and Storage of Surface Waters (May 13, 2008), Sections 1-1 through 3-15, 7-1 through 7.6, 8.1 through 10.8, and 12.1 through 12.58; Delegation of Authority from the Florida Department of Environmental Protection; Conference Committee Report on CS/CS/HB 1187, Journal of the Florida House of Representatives, May 29, 1984, page 734 and Journal of the Florida Senate, May 28, 1984, page 475; Model Water Code Commentary for Chapter 4 and Sections 4.01 through 4.04; Chapter 93-213, Laws of Florida, pages 2129-33, 2137, 2143-54, and 2157; Part VIII, Chapter 403, Florida Statutes (1991), pages 1718-1724; Florida Administrative Code Rule 5E-1.023; the fact that Part IV, Chapter 373, Florida Statutes, is based on the Model Water Code; the Applicant's Handbook: Agricultural Surface Water Management Systems, December 3, 2006; and "the official seal of the Brevard County Property Appraiser, a governmental agency, together with the photographs upon which such seal is embossed."

COPIES FURNISHED:

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NOTICE OF RIGHT TO FILE EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL
CIRCUIT COURT, BREVARD COUNTY

FRANK H. MOLICA AND LINDA M. MOLICA,

PLAINTIFFS,

v.

CASE NO. 05-2008-CA-051774

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

DEFENDANT.

FINAL DECLARATORY JUDGMENT

THIS CAUSE was heard by the Court upon the Second Amended Complaint in a proceeding for a declaratory judgment pursuant to Chapter 86, Florida Statutes. Plaintiffs sought declaratory relief with respect to their real property located in Brevard County, Florida, and their rights and obligations under Chapter 373, Part IV, Florida Statutes. The Court determines that it has jurisdiction over the parties and the subject matter hereof.

The Court heard Plaintiffs' Motion for Summary Judgment on May 19, 2009, and based upon the record in this action, the Court finds that there are no genuine issues of material fact and that the rights and obligations of the parties can be determined as a matter of law. The court makes the following findings of material fact:

1. That Plaintiffs own the property located at 2050 N. Tropical Trail, Merritt Island, Brevard County, Florida, which consists of approximately three and one half acres, which is legally described as:

In section 15, TWN 24 South, Range 36 E. Part of SW ¼ of SE ¼ and Part of Lot 4 lying East of N. Tropical Trail as described in ORB 173 Page 183, Brevard County, Florida.

2. That the Plaintiffs' property has always been zoned for agricultural use and used for agricultural purposes and no other purpose since at least the 1950's. The Plaintiffs purchased the property in 1990 and have used the property only for agricultural and silviculture purposes which include a citrus grove and more recently palm production, and, Plaintiffs have been engaged in those occupations on that land since its purchase by them.

3. That since the Plaintiffs ownership of this property beginning in 1990, it has contained no stormwater management system, dam, impoundment, reservoir, appurtenant works or works, as those terms are commonly used and understood to mean in the agricultural industry and from a civil engineering standpoint, and as defined in Chapter 373, Part IV, Florida Statutes.

4. That Plaintiffs' said property contains no pumps, open wells or artificial structures such as ditches, canals, conduits, channels, or culverts which drain water off of or onto it; it uses rainwater only.

5. If a system exists at all on this property, it would meet the criteria of a closed system as provided for in section 373.406 (3), Florida Statutes, which is an exemption from the provisions of Chapter 373, Part IV, Florida Statutes.

6. There is no record evidence that establishes that the subject property contains a system or structure which would require the Plaintiffs to obtain a permit within the meaning and purview of Chapter 373, Part IV, Florida Statutes, or ever has since its ownership by Plaintiffs.

IT IS THEREUPON ADJUDGED AND DECREED AS FOLLOWS:

A. The Defendant lacks authority to take administrative action under Chapter 373, Part IV, Florida Statutes, with respect to the Plaintiffs' use of this land since the beginning of their ownership to the date of this Order and a Final Judgment rendered pursuant hereto;

B. Because of the foregoing findings, the remaining issue with respect to the agricultural use exemption found in section 373.406 (2), Florida Statutes, is moot; and,

C. Jurisdiction is reserved as to attorney's fees and costs.

DONE AND ORDERED at Viera, Brevard County, Florida, this 8 day of June, 2009.

Z. Sauer
JUDGE OF THE CIRCUIT COURT

True Copies furnished to:

Benjamin Y. Saxon, Esquire
Frank Henry Molica, Esquire
Vance Kidder, Esquire
William Congdon, Esquire

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

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JOHN NEEDELMAN

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL OR BY PETITION, AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION OR DECISION;

YOU ARE HEREBY COMMANDED THAT FURTHER PROCEEDINGS AS MAY BE REQUIRED BE HAD IN SAID CAUSE IN ACCORDANCE WITH THE RULING OF THIS COURT ATTACHED HERE TO AND INCORPORATED AS PART OF THIS ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE RICHARD B. ORFINGER, CHIEF JUDGE OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT, AND THE SEAL OF THE SAID COURT AT DAYTONA BEACH, FLORIDA ON THIS DAY.

DATE: October 12, 2011

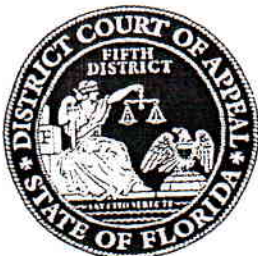
FIFTH DCA CASE NO. 5D09-2460

CASE STYLE: ST. JOHNS RIVER WATER MANAGEMENT DISTRICT v.
FRANK H. MOLICA AND LINDA M. MOLICA

COUNTY OF ORIGIN: Brevard

TRIAL COURT CASE NO. 05-2008-CA-51774

Case # 05-2008-CA-051774-XXXX-XX
Document Page # 137



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