

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
Office of Agricultural Water Policy
Mayo Building
407 South Calhoun Street
Tallahassee, Florida 32399

BINDING DETERMINATION

FDACS Clerk No. B26508

Re: Galaxy Holdings of Illinois, Inc. d/b/a Area 51 Sanctuary, Inc. / Approximately 49.5 Acre Property Located at NW 344th Street and North Parrott Avenue (US 441) in Okeechobee County, Florida / Parcel Number: 1-33-33-35-0A00-00002-0000 (the "Property")

Introduction:

Pursuant to section 373.407, Florida Statutes, 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), Florida Statutes. In order to be eligible for a FDACS 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 Section 193.461, Florida Statutes; and
- c. The activities in question must not 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, Florida Statutes, or by a dredge and fill permit issued pursuant to Chapter 403, Florida Statutes.

See *also* r. 5M-15.003 FLA. ADMIN. CODE (2020). After receiving notice from the St. Johns River Water Management District that an Environmental Resource Permit (ERP) is required for operations on the Property, Mr. Bill Kerr, on behalf of the Property owner, requested a binding determination as to whether the Property qualified for a permitting exemption, and all conditions described above have been met.

Background:

The Property consists of approximately 49.5 acres, located within Section 33 of Township 33 South, Range 35 East, west of State Road 441 north near Fort Drum in Okeechobee County, Florida. The Property consists of one individual parcel that is classified as agriculture according to 2020 Okeechobee County Property Appraiser records. Operations on the Property are currently being conducted by Area 51 Sanctuary, Inc. (Area 51). The Property is located within the boundaries of the St. Johns River Water Management District (District).

On March 14, 2017, District representatives met with the Property Owner, Ron Shoffet, on site and observed “construction of ponds around and potentially in, on, or over wetlands” and the “[p]lacement of fill from the ponds around the wetland edge and potentially inside the wetland limits.”

On April 20, 2017, the District sent a letter to Mr. Shoffet advising that an Environmental Resource Permit (ERP) is required from the District for any construction, alteration, operation, maintenance, abandonment, or removal of a surface water management system that is wholly or partially located in wetlands. The District letter required the cessation of further construction activities until the ERP was obtained and the restoration of the impacted area.

On May 3, 2018, the District sent a follow up letter to Mr. Shoffet stating that the referenced violations had not been resolved and that the project remained in non-compliance. The District advised that if Mr. Shoffet remained unresponsive, that it was authorized to take legal action and to seek substantial civil penalties per offense per day.

Between May 3, 2018 and April 20, 2020, there were numerous resolution efforts and communications between the District and Mr. Shoffet (and his representatives). These efforts included a District site inspection with Mr. Shoffet and his environmental consultant and subsequent communications regarding the wetland impact and the functional loss. After retention of a new consultant, the District again met on site with Mr. Shoffet and consultant Bill Kerr to discuss restoration and mitigation options.

Between May 28, 2020 and June 4, 2020, FDACS received information from Bill Kerr regarding the Property, which included soil reports, field investigation reports, and enforcement activity reports from the District.

On June 2, 2020, Mr. Kerr sent a letter to FDACS requesting a binding determination as to whether the operations on the Property qualified for a permitting exemption.

On June 3, 2020, FDACS notified the District that it had received a request for binding determination regarding operations on the Shoffet/Area 51 Property.

On June 25, 2020, FDACS requested information from the District regarding whether a formal wetland delineation / determination had been performed on the Property. The District responded that a formal wetland delineation / determination had not been performed.

Site Inspection Findings:

On June 18, 2020, Venessa Bessey, an Environmental Administrator with the FDACS Office of Agricultural Water Policy, conducted a site inspection on the Property pursuant to the Binding Determination request. Ms. Bessey met on site with Mr. Shoffet (Property owner) and his representatives Bill Kerr (consultant), and Gregory Sawka and Donna Smith (soil and wetland scientists). Ms. Bessey inspected the entire 49.5-acre Property, documenting the inspection with 48 digital photographs.

The Property was surrounded by high fencing, with several small cross-fenced paddocks. The Property is currently being utilized for an apiary, and sanctuary for exotic animals including ostriches, camels, zebras, and monkeys, as well as for non-exotic livestock including cattle, sheep, goats, horses, and pigs. The animals are rotated through the paddocks to maintain adequate forage. According to Mr. Shoffet, Area 51 Sanctuary is being operated as a not for profit organization, and no animals are sold to market.

There is a ditch that surrounds a large wetland area on the Property. Mr. Shoffet stated that a small ditch surrounding the wetland was present as early as 1994, and this has been confirmed through aerial imagery. Recent work on the ditch was observed, however, which increased its depth and width. Mr. Shoffett stated that some of the work was for “maintenance purposes” but that the ditch was dug deeper and wider to keep animals out of the wetland because he had lost animals that had wandered into the center of the wetland. Mr. Shoffet also stated that the ditch provided water to the animals onsite. There was also an area within the wetlands where fill had been added. Mr. Shoffet stated that the fill was added to increase the pasture area.

The site has been mapped by USDA-NRCS as Bassinger and Placid Soils, depressional, Immokalee fine sand, Myakka fine sand and Pomello fine sand. The soils in the wetland area include Myakka fine sand and Bassinger and Placid soils, depressional.

FDACS staff also performed an extensive review of all available aerial photography from 1994 to date. These aerial photographs indicate that the wetland on the Property existed well before the dredging and filling operations commenced.

Application of Statutory Criteria:

The Florida Legislature has clearly expressed the policy of the State to provide for the management of water and related land resources. See section 373.016(3), Florida Statutes. To implement this policy, water management districts are authorized to require permits and impose such reasonable conditions as are necessary to assure that the construction or operation of any stormwater management systems, ditches, culverts, structures, filling, excavation, or other construction that connects to, draws water into, or is placed in or across waters in the State will comply with statutes and applicable rules and will not be harmful to the water resources of the district. See *e.g.*, sections 373.413, 373.416, and 373.430(1)(b), Florida Statutes.

Section 373.406, Florida Statutes, provides for exemptions to the permitting requirements for the management and storage of surface waters. More specifically, section 373.406(2) provides:

“...nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land, including, but not limited to, activities that may impede or divert the flow of surface waters or adversely impact wetlands, for purposes

consistent with the normal and customary practice of such occupation in the area. However, such alteration or activity may not be for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands. This exemption applies to lands classified as agricultural pursuant to section 193.461, Florida Statutes, and to activities requiring an environmental resource permit pursuant to this part. This exemption does not apply to any activities previously authorized by an environmental resource permit or a management and storage of surface water permit issued pursuant to this part or a dredge and fill permit issued pursuant to chapter 403, Florida Statutes. This exemption has retroactive application to July 1, 1984."

In the event of a dispute as to the applicability of an exemption pursuant to this Section, a water management district or landowner may request that FDACS make a binding determination as to whether an existing or proposed activity qualifies for an agricultural-related exemption. See section 373.407 Florida Statutes. To that end, FDACS and each of the water management districts have entered into agreements which set forth processes and procedures by which FDACS undertakes its review, makes a determination, and provides notice of its determination. FDACS has exclusive authority to make this determination, and to adopt rules to implement this process. *Id.*

The applicable rule in this case, rule 5M-15.005(1), Florida Administrative Code, provides that in order for alterations or activities to be exempt from permitting under section 373.406(2), FDACS must determine that all of the following criteria are met: (a) The landowner must be engaged in the occupation of agriculture, silviculture, floriculture, or horticulture; (b) Alterations to the topography of the land must be for purposes consistent with the normal and customary practice of such occupation in the area; and (c) The alteration or activity may not be for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands.

In accordance with the above referenced statutes and rule, FDACS has evaluated the operations on the Property for compliance with each of these three criteria, commonly referred to as the "three-pronged test."

Analysis and Findings:

Pursuant to Section 373.406(2) F.S., all of the following criteria must be met in order for the permitting exemption to apply.

- (a) *"Is the landowner engaged in the occupation of agriculture, silviculture, floriculture, or horticulture?"*

YES. For the limited purpose of this Binding Determination, FDACS finds that Area 51 is engaged in the occupation of agriculture. This finding is based on the fact that the Property has been classified as agricultural by the Okeechobee County Property Appraiser's Office and that there is an active apiary operation on the Property. FDACS makes no finding, however, as to the occupation of agriculture with regard to a sanctuary of exotic animals and livestock without commercial intent.

Florida Statutes define agriculture as “the science and art of production of plants and animals useful to humans, including to a variable extent the preparation of these products for human use and their **disposal by marketing or otherwise.**” See s. 570.02(1) FLA. STAT. (2020) emphasis added. In this case, the not for profit operation does not appear to contemplate disposal or marketing. Further, the term “bona fide agricultural purposes” is defined as the good faith **commercial** agricultural use of the land. See s. 193.461(3)(b) FLA. STAT. (2020) (emphasis added).

- (b) *“Are the alterations (or proposed alterations) to the topography of the land for purposes consistent with the normal and customary practice of such occupation in the area?”*

NO. Dredging and filling in a wetland to create additional pasture area, to prevent animals from entering the center of the wetland, and to provide water to animals is not a normal and customary activity for any type of animal agriculture. Dredging an existing perimeter ditch, both deeper and wider, around and within the wetland is not a normal and customary activity for any type of agriculture in this area. This is especially true given the fact that the ditch circles the entire circumference of the wetland and has no outlet (drainage function) to support pre-existing or historical agricultural activities. Additionally, most bona fide livestock operations in Florida provide drinking water by means of water troughs or upland ponds constructed well landward of wetlands.

The activities taking place at Area 51 are more consistent with hydrologic alterations to the land requiring consultation with a Water Management District regarding the necessity of an ERP pursuant to Chapter 373, Part IV, Florida Statutes.

- (b) *“Are the alterations (or proposed alterations) for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands?”*

YES. The dredging and filling alterations to the wetlands on the Property were for the sole and predominant purpose of diverting the flow of surface waters or adversely impacting wetlands. The creation of additional pasture area and the widening and deepening of the existing ditch to keep animals out and to provide water to animals are activities conducted for the sole or predominant purpose of impeding or diverting the flow of surface waters and adversely impacting the wetland.

Conclusion:

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, FDACS has determined that the agriculture activities

associated with the wetland area on the Property do not qualify for an exemption under Section 373.406(2), Florida Statutes.

Nothing herein relieves the landowner from applying for and obtaining any applicable federal, state, or local authorization. This determination does not constitute a finding as to compliance with applicable Best Management Practices.

A determination by FDACS 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.

Notice of Rights:

If you wish to contest this 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 in this instance. Your request for hearing must contain:

1. Your name, address, and telephone number, and facsimile number (if any).
2. The name, address, and 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 FDACS, 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 FDACS (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 Office of Agricultural Water Policy, Mayo Building, 407 South Calhoun St. MS-E1, Tallahassee, Florida 32399, within twenty-one (21) days of receipt of this Notice.

If you fail to request an administrative hearing within the twenty-one (21) day deadline you waive your right to a hearing.

Supporting Documents:

- (1) Section 373.406, Florida Statutes
- (2) Chapter 5M-15, Florida Administrative Code
- (3) Aerial Photography ,1994 to 2019
- (4) Site Visit Digital Photographs
- (5) 2020 Okeechobee County Property Appraiser Information Card
- (6) USDA-NRCS Soil Survey Maps
- (7) Submittal package from Bill Kerr dated May 28, 2020 and June 4, 2020
- (8) SJRWMD Letters to Shoffet (with Exhibits)

Signed this 21st day of October, 2020



Christopher Pettit, Director, OAWP

Filed with the Agency Clerk and rendered this _____ day of _____, 2020.

Donald D. Hockman, Jr., Agency Clerk

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Binding Determination has been furnished by e-mail and U.S. mail on this _____ day of October, 2020 to: William W. Kerr Consulting Ecologists, bki@cfl.rr.com, 401 Ocean Ave., Suite 201A, Melbourne Beach, Florida 32951; and to: Suzanne Archer, sarcher@sjrwmd.com, St. Johns River Water Management District, Maitland Service Center, 601 South Lake Destiny Road, Suite 200, Maitland, Florida 32751.

A handwritten signature in black ink that reads "Bill Bartnick". The signature is written in a cursive style with a large, stylized "B" and a long, sweeping underline that extends to the right.

Bill Bartnick
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