ADMINSTRATIVE APPEAL DECISION

Mr. Mike Mehaffy; File Number 12619-2

US ARMY CORPS OF ENGINEERS, LITTLE ROCK DISTRICT

28 January 2008

Review Officer: James E. Gilmore, U.S. Army Corps of Engineers, Southwestern Division

Appellant & Representatives: Mr. Mike Mehaffy, Messrs. David Choate and Bruce Tidwell, Attorneys – Friday, Eldredge & Clark
District Representatives: Joyce Perser, Tim Scott and James Fisher

Appeal Meeting/Site Visit: 15 January 2008

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

Background Information: On 2 March 1970, Nomikano, Inc[1]., through an Easement Deed, sold for $16,500.00 "a perpetual easement and right upon land designated as Tract No. 134E, Lock and Dam No. 7, Arkansas River…" to the United States (Corps of Engineers). The Easement Deed authorized the Corps to permanently flood lands below the 249-foot elevation and to occasionally flood areas above the 249-foot elevation.

The Easement Deed states "Included among rights specifically reserved to the land owner, its successors and assigns, is the right to place fill in the area of said tract and to place structure on said fill above elevation 252 feet, m.s.l." In 1980 the Mehaffy's requested an interpretation of their entitlements and rights in reference to their Easement Deed. By letter dated 10 October 1980, the Mehaffy's were informed by the Little Rock District Commander that the rights reserved under the Easement Deed were subject to federal legislation enacted subsequent to the 1970 deed, i.e. the Federal Water Pollution Control Ace of 1972 and the Clean Water Act (CWA) of 1977. The Mehaffy's were informed that, because of this legislation and implementing regulations, a § 404 permit would be required before they could discharge dredged or fill material into waters of the US that exist on their property covered by the Easement Deed.

On 16 August 2001, the Little Rock District's Regulatory Office received a request from Mr. Mike Mehaffy, through the District's Real Estate Division, to conduct a wetland delineation on property owned by Mehaffy's. The District determined that the estimated 73-arce project site contained approximately 43 acres of waters of United States, including wetlands. The District issued an approved jurisdictional determination (JD) on 4 October 2001 to Mr. Mehaffy. Mr. Mehaffy was informed that he would have to apply

[1] Nomikano, Inc., is owned by the Mehaffy family.

for a Corps of Engineers permit before discharging fill material into waters of the US. Mr. Mehaffy was also informed of his rights to appeal the approved JD.[2]

On 5 September 2006, Mr. Mehaffy submitted a permit application to the District requesting authorization to discharge fill material into waters of the US. By letter dated 25 September 2006, the District requested additional information regarding Mr. Mehaffy's proposed project. Mr. Mehaffy submitted the requested information to the District on 28 November 2006. The District issued a public notice regarding Mr. Mehaffy's proposed project on 21 December 2006. The District denied Mr. Mehaffy's permit application on 30 August 2007 because the proposed project did not comply with the EPA's § 404(b) (1) Guidelines.

Appeal Decision Evaluation, Findings and Instructions to the Little Rock District Engineer (DE):

Reason: "Due to the explicit provisions of the Easement Deed which formed the basis of the Mehaffy family's agreement to donate an easement to the United States, the previous decision to deny Mike Mehaffy's permit application is in error and should be reversed so that a permit is issued allowing Mike Mehaffy and the Mehaffy family the right to place fill in Tract 134E**."**

Finding: The reason for appeal does not have merit.

Action: No Action Required.

Discussion: In his RFA, Mr. Mehaffy states that the District did not "provide any evidence that it actually considered the 1970 Easement Deed, nor the specific provision within it granting the Mehaffy family the right to fill Tract 134E" when the District made its decision to deny his permit application.

A review of the administrative record for this action found that there is sufficient documentation in the record to show that the District did adequately consider the Easement Deed when it made its decision regarding Mr. Mehaffy's permit application.

Contained in the file is a copy of the Easement Deed, the District's October 1980 letter to the Mehaffy's that stated the provision in the deed that authorized the discharge of fill material had been superseded by the enactment of the CWA and a memo from the District's Office of Counsel regarding the validity of the provisions in the Easement Deed which authorized the Mehaffy's to discharge fill material on Tract 134E.

The 10 October 1980 letter stated the following:

[2] Mr. Mehaffy did not appeal his approved JD.

> "Some of the rights reserved to you as the title owner of the subject property are subject to federal legislation enacted subsequent to 1970 known as the Clean Water Act. A provision found on page 2 of the Easement deed has to with the right reserved to you as owner to place fill on the property. Please be advised that Section 404 of the Federal Water Pollution Control Act of 1972 as amended by the same Section of the Clean Water Act of 1977 (33 U.S.C. 1344), and implementing Federal regulations (33 CFR 323), prescribes a Department of the Army permit as the necessary authorization for the disposal of dredged or fill material into waters of the United States, which includes certain wetlands."

Also contained in the October 1980 letter was the following statement "[P]lease be advised that the subject Easement Deed for Tract 134E is not sufficient to authorize work requiring authorization under the previously mentioned laws and regulation."

In the memo from the District's Office of Counsel to the District Commander, dated 1 March 2007, the District's Office of Counsel states the following:

> "The general rule is that courts will not enforce a contract that violates a statute, rule of law, or public policy. 17A Am Jur 2d Contracts § 295, citing Pullman's Palace-Car Co. v. Central Transp Co., 171 U.S. 138, 18 S. Ct. 808, 43 L. Ed 108 (1898), Roberts v. Criss, 266 F. 296, (2nd Cir. 1920). If it is found that Mr. Mehaffy's plan to fill and place dredge material into the waters of the U.S. located on his property "will have an unacceptable adverse impact on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas," then I could envision a ruling that the pertinent language in the flowage easement that appears to authorize Mr. Mehaffy to discharge fill and dredged material on his property is void as contrary to law and public policy.
>
> However, courts do not like to void contract (and by analogy to this situation, real estate grant) provisions unless it is unavoidable to do so. Generally, if a clause of a contract is in apparent derogation to another provision of the agreement or to the law, the court will first attempt to find harmony and to reconcile them if possible. 17A Am Jur Contracts § 384, citing U.S. Insulation, Inc. v. Hilro Const. Co., 146 Ariz. 250, 705 P. 2d 490 (Ct. App. Div. 1, 1985). In this case, I could see a court ruling that Mr. Mehaffy does indeed have the right per the language of the flowage easement to place fill in the area of said tract and to place structures on said fill material above elevation 252 m.s.l., **but only if he first complies fully with the CWA § 404 permitting process and abide by the decisions of and conditions proscribed by the regulatory authorities**." (Emphasis added.)

The District's Office of Counsel conclusion was that Mr. Mehaffy must abide by the CWA permitting process. The District Commander concurred with the conclusion made by the District Office of Counsel.

As stated above, the District did adequately review and consider the provision in the Easement Deed which reserved the Mehaffy's the right to fill and place structures on certain areas of the property. The District's conclusion, that federal legislation and regulations enacted after the execution of the deed imposed constraints on the Mehaffy's ability to exercise the deed reservation, is valid. There is no evidence of any waiver or exception with respect to the federal legislation or regulations that would support Mr. Mehaffy's appeal.

Applying the regulations, policies and guidance to the facts and circumstances involved in this appeal, the wetlands located on the appellant's property are subject to the Corps jurisdiction under § 404 of the Clean Water Act. In addition, I determined that the District followed all applicable regulations, policies and guidance during its evaluation of Mr. Mehaffy's permit application and its final decision to deny the permit application.

Conclusion: For the reasons stated above, I conclude that this request for appeal does not have merit.

Kendall P. Cox
Brigadier General, US Army
Commanding