IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2005

OSCEOLA COUNTY, FLORIDA, ET AL.,

Appellants,

v.

Case Nos. 5D04-216 & 5D04-217
CORRECTED

BEST DIVERSIFIED, INC., AND
PETER L. HUFF, ET AL.,

Appellees.

_____/

Opinion filed July 29, 2005

Appeal from the Circuit Court
for Osceola County,
Jeffords D. Miller Judge.

Steven L. Brannock and David C. Borucke, of Holland & Knight LLP, Tampa, Scott J. Johnson of Holland & Knight, LLP, Orlando, and Jo O. Thacker, Osceola County Attorney, Kissimmee, for Appellant Osceola County, Florida.

L. Kathryn Funchess, Assistant General Counsel, Department of Environmental Protection, Tallahassee, for Appellant Department of Environmental Protection.

James L. Bennett, Chief Assistant County Attorney, Clearwater, for Amicus Curiae.

Tracy A. Marshall, Mickey R.E. Ware and Dyana L. Petro, of Gray, Robinson, P.A., Orlando, for Appellees.

SHARP, W., J.

Osceola County and the Florida Department of Environmental Protection appeal from a final judgment which awarded damages, under a theory of inverse condemnation, to Peter Huff and Best Diversified, Inc. ("Huff") as the owner and operator of a landfill. We conclude there is no evidence to support a determination that the Department engaged in a taking of the property and thus reverse as to the Department. However, we find the evidence is sufficient to support a determination that Osceola County engaged in a taking of the property by unreasonably restricting Huff's efforts to close the landfill. Accordingly, we affirm the judgment as to Osceola County.

This case involves a forty-acre landfill operated as a construction and demolition debris facility in Osceola County.[1] The property has been used as a landfill since the 1960s. The landfill was not regulated by either the County or the Department until the early 1990s.

In 1991, Huff's predecessor in interest obtained a five-year permit from the Department to operate a construction and demolition debris facility on the property. A request was also submitted to the County to approve the construction and demolition facility as a conditional use of the property.[2] The Osceola Board of County Commissioners approved the request subject to numerous conditions. The approval was for five years and required the applicant to reapply at the end of that time for further approval.

[1] A construction and demolition debris facility may accept material, such as steel, glass, brick, concrete, asphalt, pipe, gypsum wallboard and lumber, from the construction or destruction of a structure.

Huff acquired the property in 1992 and the Department's permit was later transferred to him. In 1995, residents of a nearby subdivision began complaining about odors emanating from the landfill. The cause of the problem was believed to be gypsum wallboard, one of the construction materials deposited in the landfill. When wet, gypsum wallboard emits hydrogen sulfide, a gas which smells like rotten eggs. Huff tried various methods to contain or neutralize the gas, but the complaints continued.

In March 1996, Huff applied to the Department for a permit to continue operating at the landfill. A few months later, Huff submitted his request to the County for approval to continue the conditional use of the property as a landfill.

In November 1996, the Department denied Huff's requested permit because of the continuing complaints from nearby residents of foul odors, investigations by the Department which linked the odors to the landfill, and the lack of a showing that the facility would be operated in a manner to control emission of these odors. The Department specifically found the current operation of the facility constituted a public nuisance. Huff sought administrative review of this decision and, pending the administrative process he was able to continue operating the landfill under the permit.

In February 1997, the Osceola Board of County Commissioners denied Huff's request for a conditional use. At this point, the landfill was no longer able to operate. Odor complaints from the homeowners stopped shortly thereafter.

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[2] A conditional use is a use identified in the zoning regulations which may be approved subject to filing the appropriate applications and site plans.

Huff filed another application for conditional use of the property but that request was again denied by the Board of County Commissioners in August 1998. A year later, Huff filed this lawsuit against the County and Department seeking damages under a theory of inverse condemnation and under the Bert J. Harris, Jr. Private Property Rights Protection Act. [3]

In November 1999, Huff withdrew his request for administrative review of the Department's denial of his permit to operate the landfill. He also filed a "Notice of Acceptance of Agency Action," which provides as follows:

> Plaintiffs, BEST DIVERSIFIED, INC., a Florida corporation, and PETER HUFF, hereby provide formal notice that they accept the actions of Defendants, OSCEOLA COUNTY and the STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, in connection with the Defendant's denial of permit(s) to Plaintiffs for the operation of a landfill in Osceola County. Plaintiffs waive any and all rights to further challenge the propriety of the agency actions and rules. However, Plaintiffs reserve the right to maintain this action for inverse condemnation and relief under the Bert J. Harris Act.

At the trial, both the County and Department objected to any testimony regarding the propriety of their decisions to deny conditional use approval and the issuance of a permit. The County and Department argued Huff's failure to seek appropriate administrative relief and his acceptance of their actions rendered this evidence improper. Their objections were overruled and Huff was able to present witnesses and evidence that the facility was ordered to shut down because of political pressure from the nearby residents even though it was never scientifically determined the facility was

[3] The Harris Act, found in section 70.001, creates a separate and distinct cause of action for property owners where governmental regulation has "inordinately

the cause of the odor and Huff had spent large sums to implement an odor abatement system.

The trial court determined the County and Department simply weighed the interests of the nearby residents against the interests of Huff and concluded the residents' interests trumped Huff's. The court also determined the County and Department had imposed standards on Huff which made it impossible for him to continue operating the facility or to close it. Thus it was unsuitable for any other use. Such actions, according to the court, constituted an ouster of Huff from his property entitling him to relief under both his Harris Act and inverse condemnation claims.

The County and Department appealed but their appeal was dismissed for lack of jurisdiction. *Osceola County v. Best Diversified, Inc.,* 830 So. 2d 139 (Fla. 5th DCA 2002). A jury was then impaneled to determine Huff's damages. It awarded Huff $1,415,000 on his inverse condemnation claim and $1,410,000 on his Harris Act claim. Harris elected the remedy of inverse condemnation and a final judgment was entered vesting title to the property in the County and Department and requiring them to pay $1,415,000 to Huff.

On appeal from this final judgment, the County and Department argue the trial court erred in concluding their actions resulted in the inverse condemnation of Huff's property. Inverse condemnation is a cause of action by a property owner to recover the value of property that has been *de facto* taken by an agency having the power of

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burdened" the property, but does not amount to a "taking" under the Florida or federal constitutions.

eminent domain where no formal exercise of that power has been undertaken.[4] *Rubano v. Department of Transportation,* 656 So. 2d 1264 (Fla. 1995); *Sarasota Welfare Home, Inc. v. City of Sarasota,* 666 So. 2d 171 (Fla. 2d DCA 1995). A "taking" occurs when an owner is denied substantially all economically beneficial or productive use of the land. A determination of whether a taking has occurred rests on a factual inquiry that must be made on a case-by-case basis. *Sarasota Welfare Home.*

In my view, the trial court erred in reviewing the propriety of the County's action in denying Huff's application for conditional use approval and the Department's action in denying him a permit. The Board of County Commissioners denied Huff's application for conditional use approval because of concerns about past violations at the landfill and the continuing odor problems. The Department denied Huff a permit based on odor complaints, specifically finding that the current operation of the facility constituted a public nuisance.

If the County or the Department acted improperly, Huff should have sought appropriate administrative and judicial review of those actions. Huff did not do so. He dismissed his administrative appeal of the Department's decision to deny him a permit and did not seek administrative or judicial review of the County's decision to deny his application for conditional use approval. Furthermore, Huff filed a notice specifically accepting the actions of the County and Department and waiving any right to further challenge those actions. In these circumstances, Huff may no longer challenge the

[4] Florida's constitution states that no private property shall be taken except for a public purpose and with full compensation paid to each owner. Art. X, § 6a, Fla. Const.

propriety of the actions of the County and Department in denying the conditional use approval and a permit.[5]

The question, then, is whether Huff was entitled to compensation from the County and Department when his request for a conditional use and permit were denied based on their determination the facility was the cause of noxious odors and constituted a public nuisance. The answer is clearly no. *Lucas v. South Carolina Coastal Counsel,* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (harmful or noxious uses of property may be proscribed by government regulation without the requirement of compensation); *Keshbro, Inc. v. City of Miami,* 801 So. 2d 864 (Fla. 2001) (regulation eliminating the value of private property effects a taking unless the purpose of the regulation is to control a public nuisance); *State, Department of Environmental Protection v. Burgess,* 667 So. 2d 267 (Fla. 1st DCA 1995) (if landowner's proposed use of property constituted a nuisance, use was not part of landowner's property interests and compensation for denial of fill and dredge permit required for such use would not be due landowner on a theory of a constitutional taking).

The remaining question is whether the Department and/or the County effected a compensable taking by denying Huff an opportunity to close the landfill. Even the County's witnesses acknowledged the property had no use until the landfill was properly closed.

[5] *Key Haven Assoc. Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund,* 427 So. 2d 153 (Fla. 1982); *Department of Environmental Protection v. Youel,* 787 So. 2d 923 (Fla. 5th DCA 2001); *Vatalaro v. Department of Environmental Regulation,* 601 So. 2d 1223, 1227 n.4 (Fla. 5th DCA), *rev. denied*, 613 So. 2d 3 (Fla. 1992).

After he was denied conditional use approval, Huff attempted to bring construction and demolition debris into the landfill. He claimed he was properly grading and sloping the landfill, making it ready for a final cover of dirt and vegetation, in order to close the landfill. The County saw this as a continued operation of the landfill and refused to allow Huff to do so.

Later, Huff asked the County for permission to bring clean fill onto the property to grade and slope the landfill. The County responded that Huff could do so as long as the material was pursuant to a closure plan "approved by the Department." Unfortunately, this put Huff in a "catch 22" situation. The County was requiring a closure plan approved by the Department, but the evidence showed the Department was not in the business of formally approving such closure plans under these circumstances.

County Attorney Jo Thacker testified that after Huff's conditional use application was denied, the County expected the landfill to be properly closed and wanted to know what kind of material was going to be brought into the landfill. The County wanted to make sure the material was consistent with the Department's requirements pursuant to a closure plan approved by the Department. Huff could not operate the landfill and could not bring anything onto the landfill in the absence of an approved closure plan. Even clean fill could not be brought onto the property other than pursuant to a Department approved closure plan.[6]

[6] Thacker admitted the County does not have regulations regarding closure of landfills, that it is not the County's obligation to enforce the Department's rules and that there was no formal or informal agreement with the Department to monitor enforcement of the Department's rules. The County does not have any standards or parameters for closure.

Department employee William Bostwick, Jr., testified the Department does not even regulate clean fill. Clean fill is not regulated by the solid waste rules and the Department does not issue permits for moving clean fill around. "People fill areas all the time with clean fill. That would be impossible to regulate...." If Huff tried to bring clean fill onto his property to grade and slope it and prepare it for closing, the Department would not have had a problem with that.

When asked whether the Department would have required a written plan from Huff to do this, Bostwick replied: “We would have liked to have some plan showing how it was going to end up, what it was going to be like, and that it was going to be in the proper slopes and what have you, and that they were going to properly provide vegetation to prevent erosion, things of that type.” When asked whether that was something the rules required or something the Department would have liked, Bostwick replied: “At that point in time, I suspect he could have gone out and done it as long as he could demonstrate that it was proper when it was completed.”

Bostwick was also asked whether the Department required Huff to provide a written plan showing how he was going to close the landfill or whether he was just required to close under the rules. Bostwick replied: "Close under the rules basically. He referenced certain slopes and cover and what-have-you."

Bostwick acknowledged Huff would have had to bring materials onto the landfill to close it. The Department did not require anything over and above what it already had on file for Huff to close. "He could close at any time he wished."

Based on this evidence, the trial court made the following findings of fact:

> 15. From February, 1997 through the present time, the County prohibited Plaintiffs from bringing in any type of fill, including clear fill, in order to properly grade, slope and prepare the site for proper closure under DEP rules. There was no legal authority for the County's prohibition against the Plaintiffs preparing the site for closure.
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> 16. At all relevant times, the County prevented Plaintiffs from properly closing the landfill in accordance with DEP rules.
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> * * *
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> 20. The County, acting in concert with DEP, imposed standards and rules upon the Plaintiffs which were not set forth in any County code or ordinance, including the requirement that Plaintiffs provide the County with a "DEP approved closure plan" prior to undertaking activities to prepare the site for closure.
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> 21. The DEP, by applying the new rules and regulations to this C&D facility, has made it impossible for the facility to 1) reopen under current DEP standards; or 2) close the facility.
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> 22. Osceola County's actions, along with the actions of DEP, resulted in an ouster of Plaintiffs from their property.
>
> 23. Without proper closure of the C&D facility, the property has no economic beneficial use. In making this finding, the Court relies upon the testimony of the County Attorney, Jo Thacker, who admitted that Osceola County would not permit any use of the property until proper closure had been completed. The Court also accepts the testimony of David Wright and Doug Miller that the property has no reasonable use as it sits today or as it was left in February, 1997 when it was closed by the County.

We conclude the evidence supports the trial court's finding that the County prohibited Huff from bringing in clean fill to grade, slope and prepare the site for proper closure under the Department's rules and, by doing so, denied Huff all reasonable economic use of his land. However, the evidence does not support the trial court's

findings that the Department barred Huff's efforts to close the landfill. Thus he was entitled to compensation from the County for a taking of his property under a theory of inverse condemnation.

AFFIRMED as to the County; REVERSED as to the Department and REMANDED.

PLEUS, CJ., concurring in part, dissenting in part with opinion.
GRIFFIN, J., concurring in part, dissenting in part with opinion

PLEUS, C.J., concurring in part; dissenting in part.

I write to concur in the result as it relates to Osceola County. I respectfully dissent from that portion of Judge Sharp's opinion which lets the Department of Environmental Protection (DEP) off the hook. If there was ever a case in which the Bert J. Harris, Jr., Private Property Rights Protection Act applies, this is it. The unreasonable conduct of the County and DEP should serve as a warning of what can happen to private property rights. As Mr. Huff's lawyer said at oral argument, "This case is like the County and DEP telling a property owner you can operate a cemetery. You just can't dig any holes."

This case was tried non-jury. The trial court made several findings of fact which this Court must accept because they are supported by competent substantial evidence. Excerpts from the trial court's findings of fact recite the following:

> 5. The Court accepts the testimony, by deposition, of William Bostwick that there were no alleged violations which were so serious as to make DEP close the facility. The Court also accepts the testimony of David Wright that any issues relating the operation of the landfill were satisfactorily resolved with the DEP and with Osceola County, or were being resolved based on a mutually agreed upon course of action.
>
> 6. In December, 1995, the DEP adopted a new rule, through both oral communications and written correspondence from Dan Morrical to Mr. Huff which required Mr. Huff to "reduce odor levels at this facility to a level that eliminates odor complaints." Prior to that time, the DEP's promulgated rules and regulations only required the operator of the C&D facility to "minimize odors". Moreover the formally promulgated rules of the DEP did not require any offsite odor remediation for C&D facilities, as it did for Class I, II and III landfills. DEP, through its authorized representative, also adopted an unwritten standard that the

level of hydrogen sulfide emissions must be reduced to less than .001 ppm (parts per million).

. . . .

9. After the timely application was submitted to DEP, DEP formally changed its rules to require C&D facilities to obtain a specific permit for operation of a C&D facility and also imposed new rules requiring a C&D facility operator to provide financial assurances and long term monitoring of the facility after the facility was closed. Prior to these new, formal rules, C&D facilities were to be closed in accordance with DEP rules, which only required a final cover of 2 feet of dirt. The DEP did not require an approved closure plan as it did for Class I, II and III landfills, but rather, only required the C&D facility to inform the DEP after closure had been completed. Had DEP acted upon Plaintiffs' application in a timely manner, Plaintiffs would have had approximately two years to bring its facility into compliance with the new rules. DEP admitted that the general use application met DEP standards for issuance as they existed at the time the application was made.

10. In October, 1996, the County and DEP representatives met to discuss the Plaintiffs' C&D facility. The purpose of the meeting was to set forth the new rules and regulations which would be applied to the C&D facility going forward. No representative of the Plaintiffs' was present at this meeting.

11. After the October, 1996 meeting, DEP issued a Notice of Denial of the General Use Permit which stated two reasons for denial of the General Use Permit: the past conduct of the applicant and the applicant's inability to eliminate odor complaints. In September, 1997, DEP informed Plaintiffs that any further consideration of a permit for Plaintiffs' facility would be pursuant to the newly promulgated rules.

12. In February, 1997, the County denied Huff's application for conditional use renewal.

13. In February, 1997, the County locked the gates to the C&D facility and shutdown operations.

14. Prior to DEP's issuance of the denial of the General Use Permit and Osceola County's denial of the conditional Use Application, the Plaintiffs expended considerable sums of money in reliance upon the continuing operation of the landfill, including installation of a sophisticated odor abatement system.

15. From February, 1997 through the present time, the County prohibited Plaintiffs from bringing in any type of fill, including clean fill, in order to properly grade, slope and prepare the site for proper closure under DEP rules. There was no legal authority for the County's prohibition against the Plaintiffs preparing the site for closure.

16. At all relevant times, the County prevented Plaintiffs from properly closing the landfill in accordance with DEP rules.

. . . .

20. The County, acting in concert with DEP, imposed standards and rules upon the Plaintiffs which were not set forth in any County code or ordinance, including the requirement that Plaintiffs provide the County with a "DEP approved closure plan" prior to undertaking activities to prepare the site for closure.

21. The DEP, by applying the new rules and regulations to this C&D facility, has made it impossible for the facility to 1) reopen under current DEP standards; or 2) close the facility.

. . . .

25. The Court finds that there was no evidence to support DEP's and Osceola County's contention that the C&D facility constituted a public nuisance. The Court rejects the County and DEP's arguments on this issue as being unsupported by competent substantial evidence.

Based on these findings of fact, there is reason to support a determination that the DEP, acting in concert with the County, engaged in conduct which resulted in a

taking of the property. In my opinion, the judgment against the DEP should also be affirmed.

I have been doing this job for a while, and I think this is the largest verdict based on the least evidence I have ever seen. In fact, it may be the least evidence to support a verdict of *any* size that I have ever seen. Even for the most committed believer in the twin propositions that all government is evil and a man's landfill is his castle, this one is a hard sell. After five years of being operated as a construction and demolition material landfill, this property was forty acres of decaying, gas- and odor-producing construction and demolition debris. The Department of Environmental Protection ["DEP"] refused to renew the permit to operate and Osceola County refused to extend the conditional use of the land as a landfill. Under DEP regulations, the landfill had to be properly closed. Everyone agrees that the only way to properly close the landfill and to restore the land to other utility in accordance with DEP regulations was to cover it with two feet of dirt. What Mr. Huff's attorneys have succeeded in doing is convincing the people who matter that Osceola County, for no apparent reason, and against all logic, refused to let Mr. Huff do this. This is a feat of advocacy so adroit that I predict it will go down in Florida legal history as the eminent domain equivalent of "If the glove doesn't fit, you must acquit."

The plaintiff's theme was this: Osceola County kept telling Mr. Huff that whatever he proposed to do with the landfill had to be as part of a closure plan approved by DEP, but the movement and placement of clean fill dirt is not regulated by DEP so *if* Mr. Huff had asked DEP for its approval to deposit clean fill dirt, he wouldn't have been able to get it. By requiring this impossible task, the County prevented him from placing the required dirt on the landfill and restoring his property to any beneficial use.

All of this tale is fiction, except it is true that DEP doesn't regulate the placement of clean fill dirt. As the DEP witness explained, there is too much of it on the move every day in Florida and there is no real reason to do so. But that fact is exquisitely beside the point. DEP does have the responsibility to regulate closure of construction and demolition debris landfills. *See* Fla. Admin. Code R. 62-701.730(1). Here is how the procedure was described by Mr. Huff's own engineer:

> Q Now, with respect to closure as of February of '97, what would have had to have happened for proper closure? First define for the Court what closure is because we're talking about closing the facility to not let it operate, but then we have closure. Can you distinguish between those for the Court?
>
> A Sure. And I'll deal with closure because that's what I understand your question was framed around.
>
> Q Yes, sir.
>
> A In the normal course of conducting business activities, when a landfill reaches the final operational levels, in this case the final height that it was designed and intended to achieve, at that point there would be in accordance with the DEP regulations a notification to the DEP that that facility would embark on the normal standard closure.
>
> And in accordance with the regulations in effect as of February 1997, that would include placing two foot of dirt over all portions of that said landfill that had not yet [sic] through the sequential closure – through the normal business activities prior to that date. You would then place the two foot of dirt, achieve the proper grading and slopes on that landfill.
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> You would then seed and mulch that landfill to ensure that you got proper vegetative cover. You would verify that all activities had been terminated during that six-month period, that all necessary site cleanups had been undertaken, and that when you reached that final point where you felt closure was achieved, you would notify the DEP for them to come to verify that they concurred with closure being completed.

Q In your experience, the closure mechanic does not involve county regulations. These are DEP regulations?

A I have been specifically referring to DEP regulations to date, although the County has followed the DEP regulations as stipulated.

Q Now, you mentioned at the front end of your answer when you start the closure process, you used the word "notification." What is that? You said there was some notification.

A Under a general permit and even under the standard landfill permit, you would allow the DEP to know that you have reached the point of final operational level for the landfill. You would let them know that you were embarking on beginning the commencement of closure to ensure that they were aware and could verify that what you were about to close was consistent with what you said you intended to accomplish when you were given either your standard landfill permit or in this case a general permit.

Q And is this notification typically in writing, or you just call somebody on the phone and tell them you're going to do it? How does that happen?

A Not having the regulations in front of me, I don't recall it being in writing, but historically any notification would be in writing. It would usually be sent by certified mail return receipt requested.

Q And in February of '97, were you asked to notify DEP on behalf of Mr. Huff of an intent to close this facility?

A Since there was no intent to close, no sir, I was not.

Q And do you know whether Mr. Huff put the DEP on notice of any intent to close after the Board of County Commission meeting in February of '97?

A I do not have direct knowledge of all of Mr. Huff's activities, so it would be unfair for me to try to comment.

Q Do you have any knowledge or can you ballpark for us in February – following the February '97 Board of County

> Commission meeting if there was going to be this closure pursuant to notification what the cost would have been at that time?
>
> A Leading up until February of 1997 with the anticipation that that facility would have continued to operate to reach the point where the final height of the cell reached the design level, we had estimated the final closure cost, since sequential closure was occurring simultaneously with operation, would have been approximately 300,000 dollars.
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> * * *
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> Q The fact that Mr. Huff told you to cease your efforts due to the result of the Board of County Commissioners in February of '97, do you believe in March of 1997, April, May, June, July and August of '97 that Mr. Huff had the financial ability to pay that much for closing costs without operating the facility to earn revenue to do so?
>
> A I guess I can give you a two comment response to that. A, he told me he did not; B, I was not aware of Mr. Huff's financial ability.
>
> Q Did he tell you that he did not have the ability in that time period I'm talking about to close it without operating it to close?
>
> A Yes.

Keep in mind that the only issue as to this claim is not whether the county acted wrongfully in refusing to extend the conditional use zoning for operation of a landfill after February 1997, but whether the county refused to let him do what he was entitled to do in order to put the property to other uses. His right to operate a landfill in any manner had indisputably expired. After Osceola County refused to allow an extension of the conditional use, the landfill was ordered to cease operations on February 17, 1997.

Osceola County made it clear to Mr. Huff, after his conditional use permit under Osceola County's zoning had expired, that the landfill had to be closed, i.e. no more operation of a landfill. Closure under the DEP regulations at a minimum required two

feet of dirt cover. What the record shows clearly is that Mr. Huff made many proposals for the property after his zoning expired, but none involved showing up with two feet of clean dirt cover to close it; nor did Mr. Huff have the resources to close the landfill by placing the dirt cover; nor did he ever ask DEP to approve any of his plans. His theory is that he is relieved of any of these burdens because the County's demand that DEP approve the placement of clean fill was impossible: "The County said I had to get the DEP to approve my closure plan, closure requires clean fill and DEP doesn't regulate clean fill, so by requiring DEP approval of a closure plan, the County has effectively confiscated my landfill and owes me $1.4 million."

Both sides agree that the key evidence on this issue of the County's refusal to let Mr. Huff close his landfill is found in the exchange of correspondence over an approximately one-year period between Mr. Huff's counsel and the County. What this exchange of correspondence demonstrates without dispute is that Mr. Huff never offered to close the landfill by placing the two feet of dirt onto the property. Indeed, this was the exact opposite of what Mr. Huff was determined to do, which was to continue to operate the landfill and generate revenue over the remaining expected five-year life of the landfill. His idea was that some of these revenues would pay for the eventual fill, grading and dressing of the slopes. According to the estimates, the continued operation of the landfill for the second five-year "expected life" would generate in excess of $10 million in revenues and the cost to apply a proper clean fill cover and maintenance subsequent to closure would be somewhere in the $300,000 to $450,000 range.

The "closure" correspondence began in July 1997, a few months after the County disallowed continued operation of the landfill. Mr. Huff's counsel sent the Osceola

County manager a "proposed business plan for closure." This basically consisted of a proposal for continued operation of the landfill for five more years as a construction and demolition debris facility, with assurances of monitoring hydrogen sulfide gas and odor management and promises of funds available at the end of the five years to fund closure according to a closure plan submitted to DEP ninety days before the last day waste is accepted.

Shortly thereafter, on August 8, Mr. Huff's offensive began. His counsel informed the Osceola County manager that Mr. Huff was going to "bring into the landfill material and equipment that will be used in grading and sloping the site in order to correct any drainage problems that may have arisen since the landfill ceased operation." This "material" turned out to be construction and demolition debris. When the County objected that this was exactly the activity that he was no longer allowed to undertake, Mr. Huff responded that he was not "operating a landfill" by placing this construction and demolition debris on the landfill because this was not construction and demolition debris that was being dumped by a member of the public for a fee. Rather, he had contracted with "Gemini Waste Services, Inc." to perform compaction, grading and sloping at the site through the use of additional construction and demolition material. In essence, he contended that he had the right to dump whatever he wanted to onto the landfill so long as long as he was not "operating" a landfill. He contended that he had entered into a legitimate contract with Gemini to buy suitable construction and demolition material and he threatened a lawsuit for tortious interference with his contractual relationship with Gemini if the County did not allow him to proceed. As it turns out, Gemini (appropriately

named) was a corporation owned by Mr. Huff's wife. It was a creative scheme, but the County refused to let him do it.

Mr. Huff's next salvo began with a letter dated December 31, 1997, in which the Osceola County manager was informed that Mr. Huff "hope[d] to bring dirt fill material and crushed concrete onto the facility within the next week." Notably, this letter does not refer in any way to the use of this material for closure of the landfill or explain how crushed concrete might meet the closure requirement of a dirt cover. The response of the County was to inform Mr. Huff's counsel that in light of the expiration of the conditional use, Mr. Huff was required to *close* the landfill in accordance with applicable DEP regulations and, therefore, the only activities Mr. Huff would be allowed to conduct were those connected with closure of the facility. The letter continues:

> If the activities your client seeks to conduct have been approved by the Department of Environmental Protection as part of the statutory closure plan requirements, please provide me with evidence of the Department's approval and I will promptly review same with staff. Assuming there are no questions, I am sure your client will be given authorization to proceed. However, if your client's proposal is not in connection with an approved closure plan, the activities your client intends to undertake are prohibited."

Shortly thereafter, Mr. Huff filed a notice of claim under the *Harris* Act and his counsel wrote to the Osceola County attorney a letter dated February 26, 1998, that included the following:

> I think we can all agree that, rhetoric aside, we have an environmental problem on our hands that is in dire need of a solution. From our prospective, the critical issue is how to close the landfill in accordance with the applicable rules and regulations of the Department and continue to contain the odor control/maintenance system at the facility. In its simplest terms, the solution is purely an economic one:

> where do we find the money to accomplish what we all agree needs to be done? Since neither the State nor the County has expressed any interest in either purchasing the site or funding closure, the only alternative would appear to be to allow the landfill to generate sufficient funds to pay for the closure. How this will be allowed to occur is the problem we must address.

Transmitted with this letter for re-consideration by the County was the "open to close" business plan that had been transmitted the summer before.

On July 15, 1998, Mr. Huff's counsel again wrote to the county attorney the following:

> Closure procedures have not been initiated for two reasons. First and foremost, it has been Mr. Huff's hope that the P&D Landfill would ultimately reopen. Second, the "final load" of material that would trigger the time frame for closure has not yet occurred. The Department of Environmental Protection ("Department") is aware of the status of the landfill and has made no demand that Mr. Huff initiate closure.
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> The rules governing the operation of landfills promulgated by the Department of Environmental Regulation are rather strict on this issue and require that the landfill be properly closed for obvious health reasons. There are not many available options to achieve this purpose. Since neither the State nor Osceola County have expressed any interest in either purchasing this site or funding its closure, the only alternative is to allow Mr. Huff, either directly or through an operating or management agreement, to operate the facility in order to generate the funds necessary to close the landfill. ". . . the landfill has been in the same location for over twenty years. It has a limited life expectancy that can, with the proper guidelines, be used to generate the income necessary to fund proper closure."

The following week counsel sent a letter to a member of the Board of County Commissioners of Osceola County as follows:

> Peter Huff has applied for a conditional use permit from Osceola County to reopen the P&D Landfill located on Old Lake Wilson Road in Kissimmee. . . . The purpose of the current application is to allow the facility to reopen in order to generate the monies necessary to properly close the facility in accordance with the requirements with the Department of Environmental Protection . . . . The problem facing Mr. Huff, as well as the State and Osceola County, is how to properly close the facility. Mr. Huff is aware that, as both the owner of the landfill and the property upon which it is located, he is ultimately responsible for properly closing the facility. Unfortunately, it takes money to do this properly and without a source of income to provide the necessary funds, Mr. Huff is unable to meet the closure requirements. Opening the facility to generate revenue to fund an escrow account dedicated to closing the landfill would appear to be the most reasonable option available to all concerned in order to insure closure of the facility in a timely manner.

The final correspondence contains the following:

> [T]he purpose of the application was to reopen the landfill for the sole purpose of generating the funds necessary to properly close the facility pursuant to the requirements of the Department of Environmental Protection. The purpose of the application was not, as suggested by Ms. Payne, to meet 'my client's desire to continue operating the landfill'. I can assure that Mr. Huff has only one desire, and that is to open the landfill in order to insure its proper closure. The requirement to properly close the facility remains in spite of the County Commission's action, and must, therefore, still be addressed . . . . In order to bring this matter to closure, Mr. Huff offers Osceola County the following options:
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> 1. Purchase the property for $6.75 million;
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> 2. Lease the facility from Mr. Huff for a rate of $450,000 per year and assume the responsibility for closing the landfill. The lease would be for the length of time the County required to achieve its(this?)purpose; or
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> 3. Issue a conditional use permit for the specific purpose of generating the funds necessary to properly close the facility.

Finally, the letter says this:

> As you know, neither the State of Florida nor Osceola County has any statutes, ordinances or rules that would prohibit Mr. Huff from accepting clean fill or inert material on the property. Nevertheless, last September, when Mr. Huff attempted to bring such material to the site in order grade and slope the property as part of the closure process, the Osceola Code Enforcement staff issued citations to both Mr. Huff and the truck drivers. Mr. Huff was advised by at least one Code Enforcement staff that clean fill could be disposed of at the facility as long as Mr. Huff did not charge for the disposal. We have yet to receive a response from the County to our repeated inquiries as to the underlying authority for the County's action or why clean material could be disposed of without charge, but not accepted if there was any exchange of money. The conditional use permit that expired on February 17, 1997, specifically requires that the landfill be closed in accordance with the applicable rules of the Department of Environmental Protection. The use of clean fill is consistent with these rules, and is an allowed medium to achieve the proper sloping and grading necessary for closure. Mr. Huff intends to commence filling his property with this material on or about September 1, 1998, and would request the County's support in these efforts, or the authority under which the County would prohibit such activity.

The County responded by reiterating what it had said in January 1998 – that if the activities Mr. Huff sought to conduct were approved by DEP as part of a statutory closure plan, the County will give authorization to proceed, but if Mr. Huff sought to undertake activities that were not in connection with an approved closure plan, such activities would be prohibited.

Seemingly obvious is the proposition that after the expiration of his conditional use permit and the denial of his subsequent application to renew his conditional use permit in February 1997, Mr. Huff no longer had the right under the zoning laws of Osceola County to operate a landfill. Moreover, having ceased to operate a landfill under DEP regulations, he had an affirmative duty to close the landfill in accordance

with DEP's regulations. Manifestly, the one thing Mr. Huff *never* offered to do was to close the landfill. He repeatedly offered to open the landfill in order to generate funds to "eventually" close it; he sought to dump more construction and demolition debris on the landfill to "improve its drainage." He informed the County on one occasion that he wanted to bring in fill dirt material and crushed concrete, but he never identified the source of the material and nothing was mentioned about closing the landfill. His final proposal appears to have been to operate as a "clean fill" landfill, challenging the County to explain why, if he could bring dirt on to close the landfill, he couldn't open it to generate revenue by accepting clean fill. After reading through all of this correspondence, one thing is abundantly clear, and that is that the last thing on Mr. Huff's mind was closing that landfill.

The County's response to all this fulmination by Mr. Huff was actually rather measured -- "just let us know whatever you have in mind for closing, not operating, the landfill and that DEP says it is OK, and we'll let you do it." Not surprisingly, Mr. Huff never asked DEP to approve his closure plan for the obvious reason that he did not have a closure plan.[7] The idea that Mr. Huff was stymied by the County's demand that whatever Mr. Huff did would have to be part of an approved closure plan because DEP did not regulate the placement of clean fill, turns logic on its head and ignores the record completely. I would reverse the judgment in its entirety.

[7] Notably, for the first several months after the conditional use to operate the landfill had expired, while Huff was attempting to place construction and demolition debris that he had "purchased" from his wife's company, Gemini, Huff took the position that under the DEP permit, construction and demolition debris was the *only* material DEP would allow him to place on the landfill.