

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARMS E. CLARKE and JUDITH)	
CLARKE)	
)	
Petitioners,)	
vs.)	CASE NO. 89-6051
)	
FLOYD E. MELTON, ALICE MELTON,)	
and DEPARTMENT OF ENVIRONMENTAL)	
REGULATION,)	
)	
Respondents.)	
_____)	
)	
CLAUDETTE E. TRAURIG,)	
)	
Petitioner,)	
vs.)	CASE NO. 89-6135
)	
FLOYD E. MELTON, ALICE MELTON)	
and DEPARTMENT OF ENVIRONMENTAL)	
REGULATION,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Hearing Officer from the Division of Administrative Hearings, on July 27, 1990, in Key Largo, Florida.

APPEARANCES

For Petitioner: Michael F. Chenoweth, Esquire
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For Respondents James S. Mattson, Esquire and
Floyd and Alice Joseph J. Vetrick, Esquire
Melton: MATTSON, TOBIN & VETRICK
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For Respondent Cecile I. Ross, Esquire
Department of Assistant General Counsel
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STATEMENT OF THE ISSUE

The issue is whether the applicants-respondents Floyd and Alice Melton have provided reasonable assurances that their proposed dock meets the requirements of Chapter 403, Florida Statutes (1989) and Chapter 17, Florida Administrative Code, for issuance of a dredge and fill permit. Only four issues of disputed fact are raised by the pleadings in these cases: (1) whether the project will adversely affect navigation as that term is used in Section 403.918(2)(a)3., Florida Statutes; (2) whether the project will adversely affect recreational values in the vicinity of the project, in the context of the public interest test of Section 403.918(2)(a)4., Florida Statutes; (3) whether an increased number of boats at the proposed dock would cause "pollution" which would violate water quality criteria promulgated by the Department, and (4) whether the pilings will harm seagrasses in the vicinity of the dock.

PRELIMINARY STATEMENT

On October 20, 1988, Floyd Melton applied to the Department of Environmental Regulation for a permit for a 48' by 20' finger pier that had been constructed without a permit, as an addition to an existing dock, on the northwestern shoreline of his and Alice Melton's property at Lot 4, Block 2, Buccaneer Point Estates, on the eastern shore of Florida Bay, in Monroe County, Florida.

On February 9, 1989, the Department notified Melton, in an "intent to deny," that an investigation of the bay bottom at the terminus of the proposed 90' dock revealed the presence of seagrass communities and less than 5' of water depth. The Department informed Melton that his after-the-fact permit application would be denied unless modified, and recommended that the project be modified to place the terminal end of the dock 275' from mean high water.

Melton then modified the project to extend the terminus 275' offshore, and the Department sent Melton an "intent to issue" on April 4, 1989. Permit Number 44-156268-5 was issued on May 31, 1989, and Melton began to construct the dock. On September 21 and 22, 1989, the Department received letters from Charles E. Clarke and Claudette E. Traurig, in which they challenged the proposed dock. The letters were treated as requests for a copy of the agency's final action, and the Department gave them 14 days to request an administrative hearing. The Department subsequently received formal petitions from Clarke and Traurig. After receiving the petitions, the Department rescinded the permit and notified the applicant that a formal hearing had been requested. After the petitions were transmitted to the Division of Administrative Hearings, the two cases were consolidate

At the start of the hearing, on respondent Floyd Melton's request, the captions in both cases were amended to add Alice Melton as a respondent. On motion of Charles Clarke, his wife Judith Clarke was added to his case as a petitioner. At the

outset of the hearing, the Department and the applicant read a joint stipulation into the record which had the effect of modifying the proposed project as follows: the dock would be T-shaped rather than L-shaped, and the permit would include a prohibition on mooring boats anywhere except on the waterward side of the terminal platform.

At a Section 120.57 administrative hearing on a dredge and fill permit, the applicant has the burden of proof and the duty to go forward. The Meltons presented the testimony of three expert witnesses: Earl R. Rich, an expert in the field of biology; Frederick H. Hildebrandt, an expert in the field of surveying; and Robert Redman, an expert in the field of navigation. The Meltons had admitted Exhibits 1-7. Respondent Department of Environmental Regulation presented the testimony of two expert witnesses: Deborah L. Charvat, an expert in the fields of marine biology, benthic systems, and dredge and fill impacts on marine biology; and Michael W. Dentzau, an expert in the field of marine biology. The Department's Exhibit 1 was admitted. Petitioners presented the testimony of two expert witnesses: Hal Thomas, an expert in the field of surveying; and Anitra Thorhaug, an expert in the fields of biology and sea-grasses. Petitioners also testified on their own behalf and presented the testimony of Deloris Masterangelo, David Eilers, Trisha Timmons, and Shirley Kopta. Petitioners' Exhibits 1, 2, 5-9, 11, and 16 were admitted in evidence.

All parties submitted post-hearing proposed findings of fact. A ruling on each proposed finding of fact can be found in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. An 85' dock perpendicular to the shoreline of the Meltons' property at Lot 4, Block 2, Buccaneer Point Estates, Key Largo, was in existence in 1988, some portion of which was apparently constructed without the benefit of a dredge and fill permit. On October 20, 1988, Floyd Melton applied to the Department (hereinafter "DER") for an after-the-fact permit for a 48' x 20' section, as an addition to a previously existing structure.

2. After DER received the Meltons' permit application, an agency field inspector visited the site to determine whether the Meltons' proposed project could be constructed in conformance with Chapter 403, Florida Statutes, including the "public interest" tests at Section 403.918(2), and the "Keys Rule," Rule 17-312.420, Florida Administrative Code. The project site is located in Class III, Outstanding Florida Waters.

3. The relevant factual determinations that DER personnel had to make at the Melton site, to ascertain compliance with the Keys Rule, were (a) the water depths, and (b) the presence or absence of seagrass communities in the proposed boat mooring area. The proposed 90' dock would have terminated over seagrass community in less than 5' of water depth.

4. DER informed the Meltons, on February 9, 19890, that the permit would be denied unless they redesigned the dock to extend a distance of 275' out from the shore (289' total length), to where a water depth of 5' existed, limited the dock to a 4' width, and elevated the access walkway 6 feet above mean high water, to prohibit mooring along it and to increase light penetration underneath the dock. The Meltons amended their permit application to so comply.

5. There are seagrasses under the entire length of the proposed dock. There are dense seagrass communities at the terminus of the proposed dock, surrounded by less dense seagrass communities. Under the boat currently moored near the terminus of the Meltons' uncompleted dock, there is a dense seagrass bed that is not adversely affected by the presence of the boat, which is moored in 5' of water. There is a "halo" of denuded bottom extending 4-6 inches around each piling, and occasional gouges that extend beyond the halo, which features are an ordinary and expected effect of driving pilings into the sea bed.

6. Petitioners' expert's uncontroverted testimony is that 10 pilings placed in the dense seagrass bed at the end of the proposed dock would have no effect on the viability of that seagrass bed, while 100 pilings "would definitely damage" its viability. The survey introduced by the Meltons shows six pilings where the terminal platform is to be constructed, and three more offshore pilings for mooring purposes, for a total of nine. Other existing mooring pilings shown in the survey, landward of the proposed terminal platform, are to be removed in accordance with the permit.

7. The water depth at the end of the Meltons' existing 85' dock is between 3.0' and 3.25', which is comparable to other existing docks in the area. Fast boats, such as water-skiing boats and one-person watercraft, operating in shallow water over a seagrass bed can damage seagrasses by "prop scarring" or by stirring up sediments. At another dock in the area, where the water depth is 3.75' at the dock's terminus, there is evidence of damage to seagrass beds by such prop-scarring. The water depth at the end of Petitioner Traurig's dock is only 1.67' to 2.0', necessitating very careful boat operation to prevent damage to seagrasses.

8. The stipulated modification to the permit allowing three mooring pilings and requiring mooring waterward of the terminal platform clarifies DER's understanding that boats would only be moored on the waterward side of the terminal platform. No more than one or two boats can reasonably be moored at the facility. That is no more than could have been moored at the previous dock; in fact, it is equivalent to the two moored at Petitioner Traurig's dock.

9. The environmental impact of the proposed Melton dock would be far less than that of the other docks along this shoreline, primarily because it causes boats to be operated and moored in deeper water. Neither the proposed project, nor the one or two boats that can be expected to moor at the terminal

platform, will have any adverse effect on Florida Bay or the seagrass communities in the immediate vicinity.

10. The entire area of Florida Bay except for the shoreline area where the Melton and other docks in the vicinity are located is open for navigation. It is between 0.4 and 0.5 miles from the end of the proposed dock to the nearest navigation channel. The proposed dock is not a hazard to navigation in that nearest channel, the Intracoastal Waterway. It is, however, an inconvenience and can present a hazard to unwary nighttime recreational users in the waters next to the shoreline where the Melton, Clarke, and Traurig docks are located.

11. Petitioners' witnesses' testimony focused on how the Melton dock would force them to change their usual paths while recreating in the area, or traveling to and from nearby docks. Water-skiers and "knee-towers" have had to modify the route they used to take when water-skiing or knee-towing past the Melton property, now that much of the dock is in place. Some boat operators, Petitioners' witnesses included, continue to operate their boats so close to the Melton dock that near-collisions take place. A sailor chose to forego landing his catamaran at a dock near the Melton dock because its presence would have given him "a hard time getting out." Youngsters on "hydrosleds" and "wet bikes," and in small boats, have passed landward of the outermost pilings of the uncompleted Melton dock, literally going under the structure, on several occasions. One neighbor witnessed three nighttime collisions with the uncompleted Melton dock by boaters, each of which ended when the boaters extricated themselves from the pilings. Traurig's tenant next door to the Meltons, when traveling to and from her dock, complained that "you can't go straight out anymore. You have to go out and then around. You have to be cautious..." Petitioner Traurig stated that the Melton dock would "almost cause her to jump out of her unpowered sailboat and tow it into her dock," as it would limit her ability to tack in the close confines created by the new dock. Petitioner Charles Clarke, whose property is separated from the Meltons by Petitioner Traurig's property, stated that the proposed dock is "an obstacle essentially to navigation and enjoyment of that waterway as I used it..." and that he is prevented from tacking into his dock by the presence of the Meltons' dock.

12. Buccaneer Point is full of docks. The neighboring docks are generally approximately 100' long, while the Meltons' dock that DER proposes to permit will be 289' long, with mooring pilings and a boat extending this facility between 300' and 310' offshore. Boaters will be required to avoid this dock while recreating in the area, and while travelling to and from nearby docks. The proposed dock will discourage boaters and water-skiers from traveling through the very shallow waters off the ends of the other docks in the vicinity, potentially injuring themselves and the benthic communities.

13. The Melton dock will not cross over the riparian lines of the Melton property.

14. The project is clearly in the public interest by preventing ongoing adverse impacts of the existing dock, allowing the recolonization of habitat in those disturbed areas, and by extending the dock to prevent the destruction of the bay bottom. This is accomplished by elevating the dock to 6' and restricting its width to 4' in order to allow better sunlight penetration below the dock. This is also accomplished by prohibiting the mooring of vessels other than seaward of the terminus platform, thereby keeping vessels in deeper water to prevent additional destruction of the seagrass beds throughout the area.

15. During the course of the final hearing, the Meltons and DER entered into several stipulations which will promote the absence of impact to the seagrass community. They have agreed that the following conditions will be made part of any permit issued by DER:

- (A) The dock structure will be modified so that it is T-shaped rather than L-shaped.
- (B) The terminal platform and access walkway will be of the dimensions contained in DER's "intent to issue."
- (C) The access walkway can intersect the terminal platform at any point along the platform's 40' length.
- (D) There will be 3 mooring pilings placed seaward of the terminal platform.
- (E) The permit will restrict the mooring of vessels to the seaward side of the terminal platform.
- (F) The Meltons will remove the 3 mooring pilings located to the right of the dock and 2 of the 4 pilings located to the left of the dock.
- (G) The Meltons will not use a water-based barge in less than 2' of water in connection with the dock construction or driving or removing the pilings.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties in these cases. Section 120.57(1), Florida Statutes (1989).

17. The Department of Environmental Regulation has permitting jurisdiction over the proposed project pursuant to Chapter 403, Florida Statutes (1989), and Chapter 17, Florida Administrative Code. Rule 17-312.420, the "Keys Rule," precludes DER from permitting docks in Monroe County where mooring of boats will occur in water shallower than -5' MLW where seagrass communities exist on the bottom.

18. Florida Bay in Monroe County is a Class III Outstanding Florida Water, and the Meltons may not be issued a permit unless they provide reasonable assurances that they will not violate water quality standards and that their project is "clearly in the

public interest." Seven criteria are listed at Section 403.918(2)(a), Florida Statutes (1989), that DER must "balance" in determining whether a project is clearly in the public interest. Petitioners only challenged the DER's consideration of parts of the following two factors: (3) whether the project will adversely affect navigation; and (4) whether the project will adversely affect the recreational values in the vicinity of the project.

19. Reasonable assurances have been given that the project will not adversely affect any water quality standards, and that it will affect neither the public interest in navigation nor public recreation in the vicinity. "Navigation" in terms of the public interest criteria is primarily associated with the use of publicly used shipping lanes or channels. "Navigation" and "recreation" do not mean the preservation of usual recreational routes or a guaranty of one's former ease of access to and from one's dock. The boating public will have lost its access to the area between 100' and 300' offshore under and immediately adjacent to the Meltons' dock, but this neither affects the public interest in navigation nor the public interest in recreational use, as there is a vast area of Florida Bay that is still available to water-skiers and other members of the public. The only effect the Meltons' dock has on people like petitioners and their witnesses is that it forces them to alter their past routes along the shoreline, which is a minor inconvenience at most. There is no public interest that is infringed by these mere inconveniences. *West, et al. vs. Ratkovic and DER, DOAH Case Nos. 89-6363 through 89-6368 (Final Order, July 24, 1990).*

20. Each littoral property owner has a right, equal to that of his neighbors, to wharf out to navigable depths for the purpose of ingress and egress by water. This right is balanced by the public interest in preventing pollution, damage to publicly-managed natural resources such as seagrasses, and infringement on the general rights of the public to use public bodies of water for navigation and recreation. The public interest is protected by Chapter 403, Florida Statutes, and by Rule 17-312.420, Florida Administrative Code. That rule creates a presumption that docks which extend out to the 5' depth contour, where seagrasses are otherwise present, are clearly in the public interest. The protection of shallow water communities outweighs the public's right to unfettered use of those areas for navigation and recreation. No evidence was offered by petitioners to show that the public interest in navigation, or the public's right to use public bodies of water for recreational purposes, will be infringed by the construction of a dock which conforms, in every respect, to the statutes and rules implemented by DER. Any potential adverse impacts on petitioners' ability to navigate among the growing number of docks on Buccaneer Point is a minor private interest, and the statute provides no guarantee that such adjustments in courses traveled will not be required in order to preserve the broader public interest in the environment. *Riverside Club Condominium Association, Inc. et al. vs. Adventure Construction and Canvas, Inc. and DER, 9 F.A.L.R. 6207 (1987).* The statute does not protect private economic rights; rather, it is intended to preserve environmental values. *Miller v. DER 504*

So.2d 1325 (Fla. 1st DCA 1987). As in the Riverside case, petitioners here oppose the Meltons' exercise of their riparian rights in the name of protecting petitioners' riparian rights.

21. The Meltons' dock, in its uncompleted state, apparently attracts daredevil boat operators, who risk themselves, their passengers, and the people they may be towing by traveling between the pilings and underneath the structure. These intentional stunts are not within the ambit of DER to eliminate by its dredge and fill permit process.

22. Although it has been specifically found that the Melton dock will not adversely affect navigation or recreational value in the vicinity of the project, it has also been found that the Melton dock, which appears to be the first one permitted under the "Keys Rule" in Florida Bay where Buccaneer Point Estates is located, does, at this time, project far out into the Bay in comparison with the other docks in the vicinity which were permitted before the "Keys Rule" became effective. Although DER cannot prevent boaters and persons engaging in other water sports from intentionally doing so in a way which is not safe during the daylight hours when the dock is clearly visible, the evidence does indicate that on moonless nights, unwary boaters who are not familiar with the shoreline in the vicinity of the Melton dock can place themselves into a hazardous situation. For that reason, it is strongly recommended that DER also condition the Melton dock permit with the requirement that the dangers at nighttime be mitigated by some form of reflective paint or lighting for that section of the dock which extends beyond the distance of the other docks in the immediate vicinity.

23. At the commencement of the final hearing in this cause, the issues were limited to those which had specifically been raised by petitioners in the Petitions for Formal Hearing and as a result of petitioners' positions being clarified through discovery. In addition to the two issues regarding navigation and recreational values found in the public interest test criteria, petitioners generally alleged that "pollution" would result from the increased number of boats which would be moored at the Melton dock and that the seagrasses would be adversely affected by the installation of pilings for the dock. Since the Meltons have stipulated with DER that their permit should be conditioned upon boats mooring only on the seaward side of the 40' x 4' terminus platform, there will be no increase in the number of boats mooring at the Melton dock and, a fortiori, there will be no increase in "pollution." Similarly, all of the experts who testified in this proceeding, including petitioners' expert, agree that the only impact from the pilings involve that area immediately under the pilings and the expected "halo" around the pilings. Even petitioners' witness testified that the impact to the seagrass beds from the pilings would not be adverse.

RECOMMENDATION

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

RECOMMENDED that a Final Order be entered granting the Meltons' application for a dredge and fill permit, conditioned upon the stipulations and the mitigative recommendation set forth in this Recommended Order.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this __16__ day of October, 1990.

LINDA H. RIGOT
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this __16__ day of October, 1990.

APPENDIX TO RECOMMENDED ORDER
DOAH CASE NOS. 89-6051 and 89-6135

1. Petitioners' proposed findings of fact numbered 2, 3, 6, 7, 22d, 22g, 22j, and 22r have been adopted either verbatim or in substance in this Recommended Order.
2. Petitioners' proposed findings of fact numbered 1, 22f, 22h, 22i, and 22n-22q have been rejected as not being supported by the weight of the evidence in this cause.
3. Petitioners' proposed findings of fact numbered 4, 5, 19, 22a, 22c, 22e, 22i, 22k, and 22m have been rejected as being unnecessary for determination of the issues in this cause.
4. Petitioners' proposed findings of fact numbered 8-18, 20, 21, 22b, 22s, and 22t have been rejected as not constituting findings of fact but rather as constituting recitation of the testimony, argument of counsel, or conclusions of law.
5. The Department's proposed findings of fact numbered 1, 2, 6, 8-10, 12, 14, 15, 17, 19-23, and 26 have been adopted either verbatim or in substance in this Recommended Order.
6. The Department's proposed finding of fact numbered 3 has been rejected as not being supported by the weight of the evidence in this cause.
7. The Department's proposed findings of fact numbered 4, 5, and 25 have been rejected as not constituting findings of fact but rather as constituting recitation of the testimony, argument of counsel, or conclusions of law.

8. The Department's proposed findings of fact numbered 7, 11, 13, 16, 18, and 24 have been rejected as being unnecessary for determination of the issues in this cause.

9. Respondents Meltons' proposed findings of fact numbered 1-13 have been adopted either verbatim or in substance in this Recommended Order.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.