

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM E. and MARIA GREENE,)
)
 Petitioners,)
)
 vs.) CASE NO. 91-4858
)
 TAYLOR COUNTY COMMISSION and STATE OF)
 FLORIDA, DEPARTMENT OF ENVIRONMENTAL)
 REGULATION,)
)
 Respondents.)
)
 _____)
 DORIS D. BRUMBLEY,)
)
 Petitioner,)
)
 vs.) CASE NO. 91-4859
)
 TAYLOR COUNTY COMMISSION and STATE OF)
 FLORIDA, DEPARTMENT OF ENVIRONMENTAL)
 REGULATION,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before P. Michael Ruff, duly-designated Hearing Officer of the Division of Administrative Hearings, in Perry, Florida.

APPEARANCES

FOR PETITIONERS: William & Maria Greene, pro se
(William & Maria P.O. Box 38
Greene) Madison, Florida 32340

FOR PETITIONER: Doris S. Brumbley, pro se
(Doris D. Brumbley) P.O. Box 742
Monticello, Florida 32344

FOR RESPONDENT: William H. Congdon, Esq.
(DER) Department of Environmental
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FOR RESPONDENT: Conrad C. Bishop, Jr., Esq.
(Taylor County P.O. Box 167
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STATEMENT OF THE ISSUES

The issue to be determined in this proceeding concerns whether the applicant has provided reasonable assurances that the proposed bridge project will meet the requirements of Chapter 403, Florida Statutes, and the various provisions contained in Title 17, Florida Administrative Code, so that a dredge and fill permit should be issued. More specifically, the issues concern whether the various water quality standards embodied in Title 17 of the Code and Section 403.918(1), Florida Statutes, will be complied with and whether the public interest standards in Section 403.918(2), Florida Statutes, will be met in the sense that the project can be assured not to be contrary to those standards.

PRELIMINARY STATEMENT

This cause arose upon the application of the Respondent, Taylor County Commission ("County"), for a dredge and fill permit to the above-named Respondent agency, which would authorize, if granted, the construction of a bridge project in Taylor County, Florida. The application was filed on February 14, 1991 and on July 3, 1991, the Department issued a notice of intent to issue a permit for the proposed project. Thereafter, a timely petition challenging the proposed project was filed on July 18, 1991 by Petitioner, Doris D. Brumbley, and on July 24, 1991 from Petitioners, William E. and Maria Greene. The Brumbley petition and the joint Greene petition were duly transmitted to the Division of Administrative Hearings and assigned to the undersigned Hearing Officer for conduct of a formal proceeding. The cases were consolidated by the Hearing Officer's Order of November 15, 1991 under Case No. 91-4858.

The cause came on for hearing as noticed. At the hearing, the applicant and Department presented a joint case. Testifying on behalf of the Respondents were Edward L. Allen; Dr. William C. Kohler; Peter M. Hahn, accepted as an engineering expert; and Mike Eaton, accepted as an expert in the field of environmental impacts of such dredge and fill projects. The Petitioners presented the testimony of three (3) witnesses, Doris Brumbley, James Brumbley and William Greene. No expert witnesses were presented by the Petitioners. The Respondents' seven (7) joint exhibits were admitted into evidence. At the conclusion of the proceeding, the parties obtained a transcript thereof and requested and were granted an extended briefing schedule for submission of Proposed Recommended Orders. Those Proposed Recommended Orders have been timely submitted and the proposed findings of fact are addressed in this Recommended Order and specifically ruled upon again in the Appendix attached hereto and incorporated by reference herein.

FINDINGS OF FACT

1. Taylor County, through its duly-elected representative body, the Taylor County Commission, has filed an application seeking authority, by the grant of a "dredge and fill permit", to place fill material and to perform construction of a bridge across an unnamed canal in Taylor County, Florida, in the vicinity of Keaton Beach. The proposed bridge would connect Balboa Road and Marina Road on Pine Island in the community of Keaton Beach. Pine Island is an elongated strip of land separated from the Taylor County mainland by water and lying generally in a north/south direction. It is an artificial island created by dredge spoil from dredging activities by which certain canals were constructed during the decade of the 1950's. It is bounded on the west by what is known as "Main Canal", on the north by an unnamed canal, and on the east by what is known as "Back Canal". South of Pine Island is an inlet of the Gulf of Mexico. The

canals involved in this proceeding, named above, are Class III waters of the State of Florida. Marina Road runs down the center of Pine Island. Lots to the west of Marina Road abut Main Canal and lots to the east of that road abut the Back Canal. Pine Island has been platted into approximately 110 lots. There were 47 homes and two (2) trailers on Pine Island at the time of the hearing. Only 17 full-time residents live there. Keaton Beach Road, also known as County Road 361, runs in a north/south direction generally and relatively parallel to Marina Road on land lying across Main Canal from Pine Island.

2. In the past, Pine Island Drive connected Keaton Beach Road and Marina Road. It traversed Main Canal over what was known as the "humpback bridge", a wooden structure. The bridge ultimately became decayed and hazardous so that it was removed by the County in 1983.

3. East of Pine Island, forming a continuation of Pine Island Drive, is a limerock road. This road presently provides the only vehicular or pedestrian access to Pine Island. It crosses the Back Canal over a culverted-fill area, making a 90 degree turn to the north and runs north along Back Canal. It then turns in an easterly direction until it meets Balboa Road. The property to the east of the center line of Back Canal and to the east of Balboa Road belongs to Dr. William Kohler. Other than the one-half of the culverted-fill area that lies west of the center line of Back Canal, the limerock road is on Dr. Kohler's land.

4. In 1974, Taylor County was concerned about the use of the humpback bridge by school buses. It asked Dr. Kohler to grant it an easement over the limerock road for use by school buses. That limerock road passes over portions of Lots 44 and 45. Although Lots 44 and 45, east of Balboa Road, were not included in the written easement, Dr. Kohler has allowed use of the limerock road that passes over portions of Lots 44 and 45 since that time.

5. Balboa Road presently terminates in a cul-de-sac at the edge of the unnamed canal that bounds the north end of Pine Island. On Pine Island, Marina Road is paved at the present time past the front of and to the northern property boundary of Lot 13, Petitioner Brumbley's residence lot. At that point, Marina Road ends at the south side of an unnamed dirt road. Between the north side of that unnamed dirt road and the unnamed canal lie Lots 2-6. The proposed Balboa bridge will start at the end of Balboa Road, cross the unnamed canal, cross a portion of Lot 2 and 3 on Pine Island, and tie into the existing grade at the "T" intersection where Marina Road deadends into the unnamed dirt road.

6. The unnamed canal runs approximately east and west at the location of the proposed bridge. The bridge would be constructed on top of revetted fill material that will be placed to the north and south of a 15-foot wide span over the middle of the unnamed canal. The bridge construction shall be according to the Florida Department of Transportation specifications for road and bridge construction. The bridge will have a DOT approved guard rail on each side.

7. No water quality violations will result from the proposed project. Turbidity violations may occur on a temporary basis during construction and so turbidity screens and silt barriers will be installed by the applicant to prevent such turbidity from migrating away from the site itself. A condition on the grant of the proposed permit has already been agreed to by the Respondent parties which will require turbidity and erosion-control devices prior to any excavation or placement of fill material. Specific condition eight also requires that these control devices remain in place until the fill has been vegetatively stabilized after construction is over.

8. The proposed project will have a positive impact on public safety and welfare by providing proper and appropriate access to Pine Island by a more stable, safe roadway to which the bridge will be connected. During periods of high water, the present limerock access road floods, limiting emergency access to the Island. On one occasion, an injured person had to be carried down the limerock road to meet an ambulance at another location because the ambulance was unable to traverse the flooded limerock road. It is Dr. Kohler's intention to terminate use of the limerock road by members of the public since it is on his property. When that occurs, there will be no access to Pine Island unless the proposed bridge is built. The present limerock access road can be dangerous and slippery when wet, and persons using the limerock road often travel "dangerously fast", as testified to by Petitioner, Doris D. Brumbley. The 90-degree turn of the limerock road has no guardrails.

9. The proposed project will, to a minimal, temporary degree, adversely impact fish or wildlife and their habitats, marine productivity and the current condition and relative value of functions being performed by the area affected by the proposed bridge. The canal system was originally excavated out of the salt marsh. Being man-made structures, their sides have slumped somewhat and have established a small, littoral zone where vegetation grows. Mud flats at the bottom of the canal bank allow the growth of oysters. The fill area associated with the proposed bridge, however, will have a surface area and volume comparable to the culverted fill that will be removed at the point where the road presently crosses Back Canal. When the culverted-fill area or plug across Back Canal is removed, the lost vegetation and oysters will become re-established at that location, offsetting the loss that will occur at the location of the bridge. Various marine species will also become established on and benefit from the shelter of the bridge and its structure, as well.

10. The project will not cause harmful erosion or shoaling. The banks that will result from the removal of the culverted fill and the sides of the filled areas associated with the bridge will be protected from erosion with vegetation and revetments. The proposed project will enhance the flow of water in Back Canal and will improve navigation and flushing. Water flow through the existing culvert is presently considerably restricted when compared to the water flow beneath the proposed Balboa bridge area. The existing culvert is not at the bottom of the filled area. Therefore, at low water, most of the culvert is exposed, precluding the culvert from functioning at maximum capacity to aid in flushing with the water quality benefits caused by flushing being thus retarded. The lack of water flow has caused a portion of Back Canal, south of the culverted-fill area, to fill up with sediment. At low tide, parts of the Back Canal are without water. The increased flow that will result from removal of the fill plug and culvert where the road presently crosses Back Canal will allow property owners along Back Canal to navigate their boats out into the Gulf of Mexico, thus improving the recreational value of Back Canal and the navigation in the canal system.

11. There are no similar fill projects planned for or expected in the Keaton Beach area. All three Petitioners are concerned that storm water runoff from the proposed bridge will flood their property, however. At the present time, the road in front of the Petitioners' lots is paved, with the pavement ending at the northernmost end of the Brumbley property. Since the Petitioners' lots already receive roadway runoff from the existing paved road, any increase in runoff to their lots would have to come from storm water flowing along the length of the road from the proposed project.

12. The road which is to cross the proposed bridge will be composed of a 20-foot wide strip of asphalt, with 5-foot shoulders on each side. The slope from the crown of the road to the outer edge of the pavement will be one-quarter inch per one foot. The shoulders will have a slope of one-half inch per foot. Thus, rain water will flow off the sides of the road and down the shoulders, rather than down the length of the road towards the Petitioners' lots. Moreover, no additional water should be directed to the Petitioners' lots since the proposed road extension between the end of the bridge and the Petitioners' lots would be flattened. Water flowing off the bridge due to gravity will be shed toward the revetment which extends down to the canal, rather than towards the Petitioners' property.

13. Storm water impacts will be addressed again by the Suwannee River Water Management District. A storm water permit application has been submitted to the Suwannee River Water Management District and is required before the proposed project construction can start. In that storm water permit application, the applicant acknowledged its obligation and responsibility to obtain all required permitting before construction starts. The draft permit reinforces this at specific condition six: "This permit does not constitute any approval of the storm water management system which must be obtained separately from the appropriate agency."

14. All of the Petitioners are concerned about the increase in vehicular traffic which would pass in front of their lots and the Brumbley's particularly are concerned that light from headlights of increased traffic will be cast upon and into their house at night. It is clear that traffic passing the Petitioners' lots will increase due to the proposed project. It is equally clear from the angle of the bridge shown on Joint Exhibit 2 and the elevations of the bridge, shown on Joint Exhibit 3, that light from the headlights of vehicles approaching Pine Island after dark will illuminate, at least momentarily, portions of the Brumbley home.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes.

16. The Department has permitting jurisdiction over the proposed project, pursuant to Chapter 403, Florida Statutes, and Title 17, Florida Administrative Code.

17. Section 403.918(1), Florida Statutes, states:

(1) A permit may not be issued under S. 403.91 through 403.919 unless the applicant provides the department with reasonable assurance that water quality standards will not be violated.

18. Section 403.918(2), Florida Statutes, provides, in pertinent part:

(2) A permit may not be issued under S. 403.91-403.929 unless the applicant provides the department with reasonable assurance that the project is not contrary to the public interest.

- (a) In determining whether a project is not contrary to the public interest, or is clearly in the public interest, the department shall consider and balance the following criteria:
- (1) Whether the project will adversely affect the public health, safety or welfare or the property of others;
 - (2) Whether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
 - (3) Whether the project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
 - (4) Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project;
 - (5) Whether the project will be of a temporary or permanent nature;
 - (6) Whether the project will adversely affect or will enhance significant historical and archeological resources under the provisions of S. 267.061; and
 - (7) The current condition and relative value of functions being performed by areas affected by the proposed activity.

19. The permit applicant in a proceeding such as this has the ultimate burden of persuasion. The applicant at hearing must present a "prima facie case" establishing entitlement to the permit. See, *Florida Department of Transportation v. JWC Company, Inc.*, 396 So.2d 778, 787 (Fla. 1st DCA 1981). If the permit applicant establishes a prima facie case, the court's opinion then indicates that the burden of going forward with evidence to prove the truth of the facts asserted in the petition thereupon shifts to the petitioner. If the petitioner fails to present evidence, or fails to carry its burden as to the controverted facts asserted in its petition, then the prima facie case established by the applicant shall stand and the permit must be approved.

20. The applicant herein has provided reasonable assurances that the proposed project will not violate water quality standards in view of the findings of fact established above, based upon preponderant evidence. Given the fact that the removal of the culverted-filled plug area will help offset the adverse impacts related to the construction of the bridge and the positive weight given to the public safety and welfare factor involving more safe driving and access conditions, the project is not contrary to the public interest. This is especially so when one considers that the project was shown to enhance marine productivity, recreational values, and the current condition and relative value of functions being performed by the canal system area affected by the proposed activity. On balance, the insertion of the bridge structure will provide an additional area for various benthic species to attach or otherwise to find shelter and habitat, which will help offset the slight habitat loss caused by removal of the filled plug-culvert area. The removal of that area will enhance flushing in the canal system, which will promote more adequate, cleaner water levels in the canal to the benefit of benthic species of various types and the improved flushing will improve canal navigation and recreational use by the boating public. For all of these reasons, the project has been shown to be not contrary to the public interest.

21. The Petitioners' concerns about rainwater running off the proposed bridge and roadway onto their property are not well founded. The design of the paved portion of the project will shed water coming off the pavement into the unnamed canal or onto Lots 2 and 3. Part II of Chapter 40B-4, Florida Administrative Code, relates to the permitting of surface water management systems by the Suwannee River Water Management District. A surface water management system includes any system that involves storm water runoff. Rule 40B-4.1020(45), Florida Administrative Code. The necessity of obtaining a surface water management system permit from the Suwannee River Water Management District involves proof by the permit applicant, the permit applicant in this case, which will provide assurance that storm water from the proposed project will not adversely affect surrounding property owners, including the Petitioners. The issues concerning storm water runoff and the storm water management system aspect of the project must be addressed within the jurisdiction of the Suwannee River Water Management District and not in this proceeding. If the Petitioners believe that the storm water system will not properly accommodate storm water without causing a detriment to them or that, for other reasons, the storm water system should not be permitted, they will have an opportunity to challenge any proposed agency action to grant such a storm water management system permit when that agency might seek to take such action, just as they did the proposed action by DER at issue in this proceeding.

22. The Petitioners' concerns about light from vehicular headlights, increased traffic flow, and decreased property values are not concerns which can appropriately be addressed in this permitting proceeding, considering the limited jurisdiction of the Department with regard to the project and, therefore, the Hearing Officer's limited jurisdiction. Light from vehicular headlights cast into the Brumbley residence or increased traffic flow resulting from the project might indeed be a nuisance, but these are not environmental impacts related to water quality or to the public interest issues quoted above, which are the only impacts, specified in the Department's organic law, contained in Chapter 403, Florida Statutes, which can be considered in this proceeding. Those impacts are generally limited to the environmental impacts and others specifically listed in Section 403.918, Florida Statutes, the public interest standards, which do not include such considerations as economic impacts, traffic hazards, or reduction in property values. See, *Miller v. State Department of Environmental Regulation*, 504 So.2d 1325 (Fla. 1st DCA 1987).

23. Given the fact that the Island is a residential development containing less than 50 residences and that only 17 full-time residents reside there, the impact of vehicular headlights and traffic may not prove as severe as the Petitioners fear. Even if such impacts do prove so severe, the Petitioners might seek relief in the Circuit Court in and for Taylor County on a nuisance theory, but such relief cannot be afforded them in this proceeding.

24. In summary, the permit applicant established a prima facie case in support of a grant of the permit in terms of reasonable assurances that the water quality standards and the public interest standards prevailing in this proceeding and with regard to this proposed project will be met. Preponderant evidence which could refute that showing or which could establish the fact of the concerns raised by the Petitioners in their petitions has not been provided. Consequently, the permit should be granted.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is therefore,

RECOMMENDED that the application of the Taylor County Commission for the dredge and fill permit at issue, as described in the above Findings of Fact and Conclusions of Law, be granted on the terms and conditions set forth in the Department's draft permit, in evidence as Joint Exhibit 7.

DONE AND ENTERED this 3rd day of April, 1992, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of April, 1992.

APPENDIX TO RECOMMENDED ORDER

Respondent DER's Proposed Findings of Fact:

1-24. Accepted.

Petitioners' Proposed Findings of Fact:

None filed.

Respondent Taylor County Commission's
Proposed Findings of Fact:

The County adopted the proposed findings of fact filed by the Department.

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.