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STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

STEPHEN A. SPOETH and	)	
OLIVE MCCALL SPOETH,	)	
	)	
Petitioners,	)	
	)	
vs.	)	CASE NO. 94-6813
	)	
FRANK AND PATRICIA BAIRD, and	)	
DEPARTMENT OF ENVIRONMENTAL	)	
PROTECTION,	)	
	)	
Respondents.	)	
	)	

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RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Richard Hixson, held a formal hearing in this case on April 24, 1995 in New Port Richey, Florida.

APPEARANCES

For Petitioners:	Stephen A. Spoeth and Olive McCall Spoeth 14038 Pine Street Hudson, Florida 34667
For Respondent Baird:	Edson L. Garrabrants, Jr., Esquire 6008 Main Street New Port Richey, Florida 34653
For Respondent Agency:	Christine C. Stretesky, Esquire Department of Environmental Protection 2600 Blair Stone Road Tallahassee, Florida 32399-2400

STATEMENT OF THE ISSUES

The issues for determination in this case are whether an unpermitted seawall and an unpermitted catwalk constructed by Respondents Frank and Patricia Baird qualify for exemption from permitting under Rule 62-312.050, Florida Administrative Code.

PRELIMINARY STATEMENT

By letter dated September 22, 1994, the Department of Environmental Protection (DEP) notified Respondent Patricia Baird of DEP's determination that an unpermitted seawall and an unpermitted catwalk constructed on property owned by Respondent in Pasco County, Florida, met the exemption from permitting criteria set forth in Rule 62-312.050, Florida Administrative Code. DEP accordingly notified Respondent Baird that the seawall and the catwalk could

remain in place. On October 1, 1994, Petitioners, Stephen A. Spoeth and Olive Faye McCall Spoeth, filed a petition in opposition to DEP's determination regarding the authorization of the unpermitted seawall and unpermitted catwalk. Petitioners requested a formal hearing, and the case was referred to the Division of Administrative Hearings on December 5, 1994.

At hearing on April 24, 1994, Petitioners testified in their own behalf. Petitioners also presented eight exhibits which were received into evidence.

Respondent Patricia Baird testified in her own behalf, and presented the testimony of one witness, Mary-Jane Prack. Respondent Baird also presented seven exhibits which were received into evidence. Respondent Frank Baird is now deceased.

Respondent DEP presented the testimony of three witnesses, Joseph R. Bacheler, Don DePra and Bob Stetler, and also presented one exhibit which was received in evidence.

A transcript of the proceedings was filed on May 19, 1995. The parties filed proposed findings of fact and conclusions of law. Specific rulings as to each party's proposed findings of fact are attached as an Appendix hereto.

#### FINDINGS OF FACT

1. Petitioners, Stephen A. Spoeth, and Olive Faye McCall Spoeth, reside at 14038 Pine Street, Hudson, Pasco County, Florida. Mrs. Spoeth purchased the property in 1989 prior to Petitioners' marriage and has lived at this residence since that time. Mr. Spoeth has resided at the property since 1991. Petitioners' residence is located on lot 14 in the subdivision plat.

2. In addition to their residence (lot 14), Petitioners own another lot, (lot 10), directly across Pine Street from their residence. Lot 10 borders the end of a canal. Petitioners have constructed a 10.6 foot by 11.8 foot dock that extends approximately 16.5 feet into the canal from Lot 10. Petitioners also own property adjacent to lot 10 on the south side of the canal.

3. Respondent, Patricia Baird, resides at 6732 Udell Lane, Hudson, Pasco County, Florida. Respondent and her husband, Frank Baird, purchased this property in 1991. Frank Baird is now deceased. Respondent owns lots 8 and 9 as identified in the subdivision plat. Respondent's residence is located on lot 8. Both lots 8 and 9 border the north side of the canal. Lot 8 has 75 feet of waterfront, and lot 9 has 70 feet of waterfront. Lot 9 abuts Petitioners' lot 10 at the end of the canal.

4. The canal in question is a dead-end canal located in a residential community in Pasco County. The canal was artificially created on historically upland property. The canal runs east to west, is rectangular in shape, and is approximately 70 feet wide, as measured from north to south. The canal accesses into Hudson Creek which then accesses into the Gulf of Mexico. The water in the middle of the canal is generally five feet in depth; however, the depth of the water in the canal varies with tidal fluctuations. During low tides, the water over two feet in depth is shared equally between both sides of the canal channel. At normal tide flow, water at the three-foot depth level is also shared equally between both sides of the canal. Water at the five-foot depth level is slightly closer to the north part of the canal channel next to the Baird's property.

5. Since 1991, the Bairds have constructed four structures on their property: a seawall; a fixed dock; a floating dock; and a catwalk.

6. The seawall runs the length of the waterfront on both lots 8 and 9. A six-foot portion of the seawall was constructed on Petitioners' property (lot 10), and was subsequently removed as a result of a prior proceeding between these parties. The Baird seawall is level and flush with the adjoining seawall constructed on waterfront lot 7 that is owned by Mary-Jane Prack. The Baird seawall was constructed in accordance with generally acceptable building practices.

7. On lot 8 the Bairds constructed a 20 foot by 16 foot fixed dock adjacent to the seawall. The fixed dock was constructed in accordance with generally accepted building practices.

8. On lot 9 the Bairds placed an 8 foot by 12 foot floating dock with an 11.7 foot catwalk. This structure extends approximately 19.7 feet into the canal. The floating dock was constructed in accordance with generally accepted building practices.

9. In 1993 the Bairds added a 30 foot by 18 foot by 30 foot L-shaped catwalk adjacent to the existing dock on lot 9. The catwalk was constructed in accordance with generally accepted building practices.

10. Petitioners have one boat tied to their dock on lot 10. The Petitioners also keep a paddle boat and a canoe at that location.

11. Prior to the construction of the Baird's catwalk, Petitioners tied their boat with the bow pointing north. This allowed the Petitioners to access water which was generally three feet in depth. Subsequent to the construction of the catwalk, Petitioners tie their boat with the bow to the south. The water in this part of the canal is shallower than on the north side, and on some occasions when the tide is extremely low, the bow of Petitioners' boat rests in mud. Such extreme low tides usually occur in the spring of the year, and generally happen seven days a year. On such occasions Petitioners experience great difficulty moving their boat into the canal. During such low tides Petitioners also have difficulty launching their paddle boat and canoe.

12. The evidence is consistent that private boats navigate the canal. Moreover, Mary-Jane Prack testified that not only private vessels, but also commercial fishing vessels, currently use the canal on a regular basis during the day and the night. Thus, there is no question that the seawall and catwalk do not impede navigation of the canal.

13. Water quality in the canal was not tested prior to the construction of the seawall and catwalk on the Baird's property, and there is no basis to evaluate the impact of the construction of the Baird's seawall and catwalk on water quality; however, except for the initial period of construction, the building of a seawall, fixed dock, floating dock, and catwalk in accordance with generally accepted building practices does not have an adverse effect on water quality in a residential tidal canal.

14. The Baird seawall is level with the surrounding property and does not adversely affect runoff or flood control.

15. The Baird catwalk is constructed to allow water flow and does not adversely affect runoff or flood control.

16. On September 22, 1994, DEP issued a letter determining that the Baird unpermitted seawall and unpermitted catwalk met the exemption criteria set forth in Rules 62-312.050(1)(g) and (h), Florida Administrative Code. The DEP decision in this regard reversed a prior warning letter issued by DEP on December 16, 1993, to the Bairds stating that the unpermitted seawall and unpermitted catwalk were in violation of the DEP rules. The warning letter was issued by DEP under the mistaken apprehension that the canal had been constructed on sovereign state submerged land, when in fact the canal was artificially constructed on historically uplands property.

#### CONCLUSIONS OF LAW

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

18. Rules 62-312-050(1)(g) and (h), Florida Administrative Code, provide:

(1) No permit shall be required under this chapter for dredging or filling specified in Section 403.813(2), F.S., except for those projects which are subject to one or more of the general permits in Part V of Chapter 62-312, F.A.C. No permit under this chapter shall be required for dredging or filling authorized by Sections 62-4.040(1)(a) or (b), F.A.C., or for dredging or filling which has been approved pursuant to Chapters 62-17, 62-23, or 62-45, F.A.C., or for the projects listed below.

\* \* \*

(g) Construction of seawalls or riprap, including only that backfilling needed to level the land behind the seawalls or riprap, in artificially created waterways where such construction will not violate existing water quality standards, impede navigation or adversely affect flood control. An artificially created waterway shall be defined as a body of water that has been totally dredged or excavated and which does not overlap natural surface waters of the state. For the purpose of this exemption, artificially created waterways shall also include existing residential canal systems. This exemption does not apply to the construction of vertical seawalls in estuaries or lagoons unless the proposed construction is within an existing man-made canal where the shoreline is currently occupied in whole or in part by vertical seawalls.

(h) Construction of private docks in artificially created waterways (as defined in Section 62-312.050(1)(g)) where construction will not violate water quality standards, impede navigation, or adversely affect flood control.

19. The waterway in question is a residential canal within the meaning of Rule 62-312.050(1)(g), Florida Administrative Code.

20. The Baird seawall does not violate existing water quality standards, impede navigation, or adversely affect flood control.

21. The Baird catwalk does not violate water quality standards, impede navigation or adversely affect flood control.

22. The unpermitted seawall and the unpermitted catwalk on the Baird property at 6732 Udell Lane, Hudson, Pasco County, Florida, meet the criteria for exemption from permitting under Rules 62-312.050(1)(g) and (h), Florida Administrative Code.

#### RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is RECOMMENDED that:

The Department of Environmental Protection issue a Final Order upholding the Department's determination that the unpermitted seawall and unpermitted catwalk located at 6732 Udell Lane, Hudson, Pasco County, Florida, meet the exemption criteria set forth in Rules 62-312.050(1)(g) and (h), Florida Administrative Code.

RECOMMENDED in Tallahassee, Leon County, Florida, this 13th day of June, 1995.

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RICHARD HIXSON  
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 13th day of June, 1995.

#### APPENDIX

##### Petitioner's Proposed Findings:

1. Rejected except to the extent that the bow of Petitioners' boat at extreme low tides sits in the mud.
2. Rejected
3. Rejected
4. Rejected
5. Rejected as irrevelant
6. Rejected as irrelevant
7. Rejected
8. Rejected

Respondent Bairds' Proposed Findings:

1 - 7. Adopted and incorporated

Respondent DEP's Proposed Findings:

1 - 38. Adopted and incorporated

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to the 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 consult with the agency that will issue the Final Order in this case concerning their 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.