

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LINDA L. BRASWELL,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 95-1072
)	
KURT AUSCHRA and DEPARTMENT OF)	
ENVIRONMENTAL PROTECTION,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William F. Quattlebaum, held a formal hearing in the above-styled case on January 29, 1996, in Ft. Myers, Florida. The hearing officer conducted the proceeding by videoconference.

APPEARANCES

For Petitioner:	Robert E. Turffs, Esquire 227 South Nokomis Avenue South Post Office Box 1767 Venice, Florida 34284-1787
For Respondent DEP:	Christine Stretesky, Esquire 2600 Blair Stone Road Tallahassee, Florida 32399-2400
For Respondent Auschra:	No appearance

STATEMENT OF THE ISSUE

The issue in this case is whether the construction activities of Respondent Auschra were exempt from applicable permitting requirements on the basis of the application and whether the construction activities exceeded the scope of the exemption. Further, the Petitioner seeks an Order directing the Department of Environmental Protection to initiate an enforcement action against the Auschra project. The Department asserts that the Hearing Officer is without jurisdiction to require the Department to initiate an enforcement action.

PRELIMINARY STATEMENT

By Petition for Administrative Hearing dated February 17, 1995, Petitioner Linda L. Braswell challenged the determination by the Department of Environmental Protection that a project proposed by Respondent Kurt Auschra was exempt from permitting requirements. The Department forwarded the petition to

the Division of Administrative Hearings, which scheduled the proceeding. The case was transferred to the undersigned Hearing Officer on December 20, 1995.

At the hearing, the Petitioner presented the testimony of three witnesses, testified on her own behalf, and had exhibits numbered 4, 10, 12, 13, 15 and 15A, 18, and 20 admitted into evidence. Respondent DEP presented the testimony of one witness.

A transcript of the hearing was filed. The Petitioner and Respondent DEP filed proposed recommended orders. The proposed findings of fact are ruled upon either directly or indirectly as reflected in this Recommended Order, and in the Appendix which is attached and hereby made a part of this Recommended Order.

FINDINGS OF FACT

1. Petitioner Linda L. Braswell owns and resides at 5190 Latham Terrace Port Charlotte, Florida. The property is located at Lot 88 of the Gulf Cove subdivision in Charlotte County, Block 1864, Section 54.

2. Respondent Kurt Auschra owns Lot 90, located adjacent to Lot 88.

3. Mr. Auschra did not appear and was not represented at the hearing.

4. An application dated January 5, 1995, was filed on behalf of Mr. Auschra, seeking approval of seawall construction at his property.

5. The application appears to be signed by Eugene Exejet of the Charlotte County Seawall Company.

6. Respondent Department of Environmental Protection is responsible for the permitting and regulation of projects such as the Auschra project.

7. The relevant properties back up to the Latham Waterway, a man-made residential canal.

8. The Petitioner asserts that the Auschra property was landlocked and did not have access to the water prior to construction of the seawall.

9. A property is "waterfront" if the mean high waterline touches the property.

10. Evidence of the apparent mean high water line, including subdivision plats and location of vegetation, establishes that the Auschra lot was a "waterfront" lot prior to construction of the seawall.

11. Existing residential canal systems are classified as artificially created waterways by applicable administrative rules.

12. The Auschra application was reviewed by Peggy Hellenbach, an employee of the Department.

13. After the application was filed, and prior to the Department determination that the project was exempt, the Petitioner communicated her concerns to two members of the Department staff, including Ms. Hellenbach.

14. At the time of her review, the application contained sufficient information for Ms. Hellenbach to determine the location and the type of project being proposed.

15. Ms. Hellenbach reviewed the application and determined that the project was exempt from permitting requirements.

16. In determining that the project was exempt from permitting, Ms. Hellenbach considered whether the proposed project would violate existing water quality standards, impede navigation or adversely affect flood control.

17. Ms. Hellenbach determined that based on the location of the seawall and the applicant's intended use of turbidity screens during construction, water quality standards would not be violated.

18. Turbidity screens were used during construction of the seawall.

19. Because the construction site is at the "dead-end" of the waterway, Ms. Hellenbach determined that the project would not impede navigation either during or after construction.

20. Because the location of the seawall does not impact water flow, Ms. Hellenbach determined that the project would not adversely affect flood control.

21. By letter to Mr. Auschra dated February 6, 1995, the Department stated as follows:

Based solely upon the documents submitted to the Department, the project has been determined to qualify as an activity which is exempt from the need for a wetland resource permit pursuant to Florida Administrative Code (F.A.C.) Rule 62-312.050 (1) 62-312.050(1)(g).

22. The letter also provided:

The determination that your project qualifies as an exempt activity pursuant to Rule 62-312.050 (1) 62-312.050(1)(g), F.A.C., may be revoked if the installation is substantially modified, or if the basis for the exemption is determined to be materially incorrect, or if the installation results in water quality violations. Any changes made in the construction plans or location of the project may necessitate a permit or certification from the Department. Therefore, you are advised to contact the Department before beginning the project and before beginning any work in waters or wetlands which is not specifically described in your submittal.

23. Ms. Hellenbach did not visit the site prior to making her determination. There is no evidence that Ms. Hellenbach was required to visit the site prior to making her determination.

24. Construction of the project was initiated prior to the issuance of the Department's February 6 letter of exemption.

25. Given Ms. Hellenbach's subsequent review of the project after construction and her continuing assertion that the project meets applicable exemption criteria, it is unlikely that a site visit prior to construction would have impacted installation of the seawall.

26. The greater weight of the evidence establishes that, based on the information set forth in the application, the project was exempt from permitting requirements.

27. There is no evidence that the project violated existing water quality standards, impeded navigation or adversely affected flood control.

28. Department policy requires that new seawalls be built in a "continuum" with existing seawalls to prevent water quality problems caused by altered water circulation. The Auschra seawall appears to be in a continuum with the existing Latham Waterway seawalls.

29. There is evidence that vegetation, including mangroves, located both on the Auschra property and on adjoining property, was removed during the construction of the seawall.

30. Removal of vegetation is typical during installation of a seawall.

31. Based on the existing vegetation at the site, the removed vegetation most likely consisted of a thin line of red mangroves at the waterline with a large stand of Brazilian Pepper behind the mangroves and along the banks of the waterway.

32. There is no evidence that a permit was required for removal of the vegetation on the Auschra property.

33. Applicable administrative rules do not authorize removal of mangroves from adjacent properties unless the property is owned or controlled by the person performing the removal of the vegetation or unless the land is adjacent State-owned land lying waterward of the parcel of property on which the exempt activity is occurring.

34. There is no evidence that a permit was issued for removal of the vegetation on the adjoining property.

35. There is evidence that as constructed, the seawall encroaches onto the property of adjoining owners and that during construction, property of adjoining owners may have been excavated.

36. There is no evidence that the seawall encroaches onto the property of the Petitioner.

37. The evidence fails to establish that the amount of material excavated during construction of the seawall was excessive in relation to the size of the structure.

38. Ms. Hellenbach conducted a site visit after the construction of the seawall. Based on her review of the seawall construction and her knowledge of

the application, Ms. Hellenbach determined that the project continues to be exempt from permitting requirements.

CONCLUSIONS OF LAW

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

40. In relevant part, Rule 62-312.050, Florida Administrative Code, provides as follows:

(1) No permit shall be required under this chapter for dredging or filling...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....

41. The evidence in this case establishes that the project proposed by Respondent Auschra for installation on his property was exempt from permitting requirements by operation of the rule.

42. The Petitioner asserts and presented evidence that vegetation located on the property of adjoining owners, including some mangroves, was removed during the construction of the seawall. There is no evidence that a permit was issued for the removal of the vegetation.

43. In relevant part, Rule 62-321.060, Florida Administrative Code, provides as follows:

(1) No permit under this rule is required for the alteration of mangroves:

(a) on property by a person who owns or controls the property and on adjacent State-owned lands lying waterward of the parcel of property in conjunction with and as essential for any of the activities exempted from wetlands resource permit requirements by...Rule 62-312.050, F.A.C.,...provided that the alteration is limited to the minimal amount necessary to construct the authorized works....

44. Despite the apparent unpermitted removal of vegetation from the adjoining property, Ms. Hellenbach asserted that there are no violations of statute or rule warranting agency enforcement action. The Hearing Officer is

without authority to require that allegations of improper removal of vegetation be reviewed by the Department.

45. Additionally, the Petitioner asserts and presented evidence that as constructed, the seawall encroaches onto the property of adjoining owners and that during construction property of adjoining owners may have been excavated. There is no evidence of encroachment onto the Petitioner's property. Additionally, this matter is outside the jurisdiction of this proceeding.

RECOMMENDATION

Based on the foregoing, it is hereby RECOMMENDED that the Department of Environmental Protection enter a Final Order dismissing this case.

DONE and RECOMMENDED this 24th day of April, 1996 in Tallahassee, Florida.

WILLIAM F. QUATTLEBAUM
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 24th day of April, 1996.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 95-1072

To comply with the requirements of Section 120.59(2), Florida Statutes, the following constitute rulings on proposed findings of facts submitted by the parties.

Petitioner

The Petitioner's proposed findings of fact are accepted as modified and incorporated in the Recommended Order except as follows:

3. Rejected, subordinate.
4. Rejected, unnecessary.
- 5-6. Rejected, subordinate.
- 7-8. Rejected. Recitation of testimony is not Finding of Fact.
9. Rejected, unnecessary. The greater weight of the credible evidence establishes that the location of the seawall and quantity of dredged material do not render the project non-exempt.
- 10-12. Rejected. Recitation of testimony is not Finding of Fact.
- 13-14. Rejected, cumulative.
15. Rejected as to statement that "the property did not have sufficient area on the canal to build a seawall." Not supported by greater weight of the evidence.
16. Rejected. Recitation of testimony is not Finding of Fact.
17. Rejected, unnecessary.
- 18-22. Rejected, subordinate.

23-24. Rejected, unnecessary.

26-27. Rejected, fails to comply with Rule 60Q-2.031(3) requiring citation to transcript.

30. Rejected. The evidence that a "new waterway" was dredged is insufficient to be persuasive.

Respondent DEP

The Respondent's proposed findings of fact are accepted as modified and incorporated in the Recommended Order except as follows:

12. Rejected, unnecessary.

17. Rejected. There was evidence presented as to ownership of adjoining property.

24. Rejected, subordinate.

26. Rejected, unnecessary.

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 ten 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.