STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RAYMOND and NORMA KOMAREK,	)	
	)	
Petitioners,	)	
	)	
vs.	)	CASE NO. 95-1983
	)	
RAYMOND and NANCY SWART and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
	)	

RECOMMENDED ORDER

On August 3, 1995, a formal administrative hearing was held in this case in Sarasota, Florida, before J. Lawrence Johnston, Hearing Officer, Division of Administrative Hearings.

APPEARANCES

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For Respondent: (Swart) Henry Trawick, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Environmental Protection (DEP) should grant the application of Raymond and Nancy Swart, Trustees, (the Swarts) for a permit to construct a private multislip dock facility at their property on Little Sarasota Bay in Sarasota County, DEP File No. 5826007043, with certain modifications and conditions.

PRELIMINARY STATEMENT

On or about March 22, 1995, the DEP gave notice of Intent to Issue to the Swarts the permit for which they applied, with certain modifications and conditions. On or about March 30, 1995, Raymond and Norma Komarek, the owners of property next to the Swart property, objected in writing to the scale of the proposed dock facility. The DEP assigned its OGC Case No. 95-0771 to the written objection and referred it to the Division of Administrative Hearings

(DOAH) with the request that it be treated as a request for formal administrative proceedings under Section 120.57(1), Fla. Stat. (Supp. 1994). After receipt of responses to the Initial Order, the case was scheduled for final hearing in Sarasota on August 3, 1995.

At final hearing, the DEP went forward with the presentation of evidence, calling one witness and having DEP Exhibit 1 admitted in evidence. The Komareks testified in their own behalf and also called the Swarts' environmental consultant. They also had Petitioners' Exhibit 19 admitted in evidence. (Objections to Petitioners' Exhibits 3, 5, 7, 13, 14, and 17 were sustained.) The Swarts called two witnesses and had Swart Exhibits 2, 3 and 4 admitted in evidence. The DEP then recalled its witness and had DEP Exhibit 2 admitted in evidence.

After the hearing, the DEP ordered the preparation of a transcript of the final hearing, and the parties were given ten days from the filing of the transcript in which to file proposed recommended orders. Explicit rulings on the proposed findings of fact contained in the parties' proposed recommended orders may be found in the Appendix to Recommended Order, Case No. 95-1983.

FINDINGS OF FACT

The Application

1. On or about November 8, 1994, Raymond and Nancy Swart, Trustees, applied for a permit to construct a private multislip dock facility at their property on Little Sarasota Bay in Sarasota County, DEP File No. 5826007043.

2. As proposed, the dock would consist of: 237' of five foot wide access pier; a terminal dock 45' long and 5.5' wide; and eight finger piers 20' long and three feet wide. All of the structures were proposed to be three feet above mean high water (MHW). Normal construction procedures would be used to "jet" pilings into place, including the use of turbidity screens.

3. As proposed, the dock would provide nine slips for the use of the owners of the nine lots in the Swarts' subdivided property, known as Sunset Place. There would be no live-aboards allowed, and there would be no fueling facilities, sewage pump-out facilities or any other boating supplies or services provided on or at the dock. Under the proposal, verti-lifts would be constructed for all of the slips at a later date. (When boat owners use verti-lifts, there is less need to paint boat bottoms with toxic anti-fouling paint.)

4. As part of the application, the Swarts offered to grant a conservation easement encumbering approximately 400' of shoreline.

The Intent to Issue

5. Because Little Sarasota Bay is designated as an Outstanding Florida Water (OFW), and because of concerns regarding the maintenance of its environmental quality, the DEP required that the Swarts submit additional information for review in connection with their application. Specifically, the DEP wanted them to perform a hydrographic study to assure adequate flushing at the site and a bathymetric survey to assure adequate water depths and minimal impacts on seagrasses.

6. After review of the additional information, the DEP gave notice of its Intent to Issue the permit, with certain modifications and conditions.

7. The Intent to Issue would require that the "most landward access pier . . . be extended an additional 15 feet to avoid the mooring of watercraft within seagrasses." It also would require the decking of the main access pier (155' long), which would cross seagrass beds, be elevated to a minimum of five feet above mean high water (MHW). (This would reduce shading and minimize impacts on the seagrasses.)

8. The Intent to Issue included specific measures for the protection of manatees during and after construction.

9. The Intent to Issue specifically prohibited hull cleaning, painting or other external maintenance at the facility.

10. The Intent to Issue specified the width of the 400' long conservation easement (30', for an area of approximately 0.27 acres) and required the Swarts to "plant a minimum of 50 planting units of Spartina patens and 50 planting units of Spartina alterniflora at appropriate elevations imediately waterward of the revetment along the northern portion of the property . . . concurrrent with the construction of the permitted structure." It specified planting procedures and included success criteria for the plantings (an 85 percent survival rate).

The Objection

11. On or about March 30, 1995, Raymond and Norma Komarek, the owners of property next to the Swart property, objected in writing to the "magnitude" of the proposed dock facility. They complained that the proposed dock facility "will not enhance anyone's view, but it will create disturbance with noise, night lights, wash and erosion on shore, even possible pollution from up to 35 foot boats." They continued: "We prefer not to live next to a Marina. This appears to be a commercial venture tied to the sale of real estate and/or houses . . .." They conceded that their concerns for manatees had been addressed, but they raised questions regarding the impact on commercial fishermen running crab trap lines, scullers, jet skis, and water skiers. They objected to restrictions on "one's personal rights to use the water by obstruction of navigable waters." They also alleged that the proposed dock facility would be a navigation hazard, especially in fog. The Komareks suggest that the three exempt 125' docks to which the Swarts are entitled under Sarasota County regulations, with the two boats allegedly allowed at each, should be adequate and are all the Swarts should be allowed. The Komareks' objections conclude by questioning the alleged results of alleged "turbidity tests" showing that there is "good action" (apparently on the ground that they believe Little Sarasota Bay has "declined") and by expressing concern about the cumulative impact of future dock facilities if granting the Swart application sets a precedent.

The Komareks' Evidence

12. The Komareks were able to present little admissible evidence at the final hearing in support of their objections. Much of the environmental evidence they attempted to introduce was hearsay. Moreover, at best, most of it concerned Little Sarasota Bay in general, as opposed to the specific location of the proposed docking facility.

13. The alleged "turbidity tests" called into question in the Komareks' objection apparently refer to the hydrographic study done at the request of the DEP. The evidence the Komareks attempted to utilize on this issue apparently were the kind of general information about Little Sarasota Bay on which the DEP

had relied in requesting the hydrographic study. There was no other evidence presented to contradict the results of the Swart study.

14. While the proposed dock facility would project into the view from the Komarek property looking towards the north (and from the property of the neighbors to the north looking towards the south), there was no other evidence that the proposed dock facility "will create disturbance with noise, night lights, wash and erosion on shore . . .." "[P]ollution from up to 35 foot boats" is "possible," but there was no evidence that pollution is probable or, if it occurred, that the kind and amount of pollution would be environmentally significant.

15. The application clearly is a "commercial venture tied to the sale of real estate and/or houses . . .." But the use of the dock facility would be personal to the owners of lots in Sunset Place; the use would not be public.

16. The Komareks presented no evidence "regarding the impact of the dock facility on commercial fishermen running crab trap lines, scullers, jet skis, and water skiers." Clearly, the dock facility would extend approximately 250' into Little Sarasota Bay. But there was no other evidence either that it would restrict "one's personal rights to use the water by obstruction of navigable waters" or that it would be a navigation hazard. (There was no evidence to support the suggestion made at final hearing that an access dock built five feet above MHW would be a dangerous "attractive nuisance" or that it would be more hazardous than one built three feet above MHW.)

Evidence Supporting DEP Intent to Issue

17. Very little pollution can be expected from the actual construction of the dock facility. Primarily, there is the potential for temporary turbidity during construction; but the use of turbidity screens will help minimize this temporary impact. The conditions volunteered in the Swart application, together with modification and additional conditions imposed by the DEP Intent to Issue, limit other potential pollutant sources to oil and gas spillage from the boats using the dock facility.

18. The Swarts' hydrographic study demonstrates that, notwithstanding relatively poor circulation in the general area of Little Sarasota Bay in which the proposed dock facility is located, there is adequate flushing at and in the immediate vicinity of the proposed facility, at least to the limited extent to which pollutants may be expected to be introduced into Little Sarasota Bay from construction activities and use of the facility with the conditions volunteered in the Swart application and imposed by the DEP Intent to Issue.

19. A primary goal of the Komareks' objection is to "downsize" their neighbors' proposed dock facility. They object to its length and its height above MHW. Presumably, they believe that "downsizing" the Swart dock facility would improve their view. If it could not be "downsized," they would prefer that the Swart application be denied in its entirety and that three exempt docks, accommodating two boats each, be built in place of the proposed facility.

20. Ironically, the evidence was that if the Komareks' primary goal is realized, more environmental harm would result. The evidence was that a shorter, lower dock would do more harm to seagrasses, and three exempt docks (even if limited to two boats each) would have approximately three times the environmental impact. Indeed, based on environmental considerations, the DEP Intent to Issue required the Swarts to lengthen the access dock proposed in

their application by 15 feet and elevate it by two feet. Lengthening the access dock would move the part of the facility where boats would be moored to deeper water with fewer seagrasses. In that way, fewer seagrasses would be impacted by construction, fewer would be shaded by the mooring of boats, and fewer would be subject to the risk of prop scarring. In addition, the risk of scarring would be reduced to the extent that the water was deeper in the mooring area. Finally, DEP studies have shown that elevating the access dock would reduce shading impact on seagrasses under and adjacent to the dock.

21. Besides having more than three times the environmental impact, exempt docks would have none of the conditions included in the DEP Intent to Issue. Verti-lifts would not be required. Methods of construction would not be regulated by the DEP. Measures for the protection of manatees, before and after construction, would not have to be taken. Hull cleaning, painting or other external maintenance would not be prohibited. Live-aboards, fueling facilities, sewage pump-out facilities and other boating supplies and services would not be prohibited (although County regulation may prohibit some of these activities). Finally, there would be no conservation easement and no planting of seagrasses.

22. The Komareks suggest that County regulation may prohibit construction in accordance with the DEP Intent to Issue. But that would be a question for the County to determine in its own proceedings.

23. All things considered, the DEP Intent to Issue is clearly in the public interest.

CONCLUSIONS OF LAW

24. F.A.C. Rule 62-312.030(1) requires a DEP permit for dredging and filling in state waters, unless otherwise exempted by statute or rule. Under F.A.C. Rule 62-312.020(11), dredging and filling is defined to include the placement of pilings in waters of the state. Under these rules, the Swarts require a DEP permit for their proposed dock facility. F.A.C. Rule 62-312.080(1) prohibits the issuance of a DEP permit dredge and fill permit unless the applicant provides reasonable assurance based on plans, test results or other information that the proposed dredging and filling will not violate water quality standards.

25. Previously, the statutory authority for the DEP's rule dredge and fill permitting requirements was the Henderson Wetlands Act, Sections 403.91, et seq., Fla. Stat. (1991 and Supp. 1992). But the Henderson Wetlands Act has been repealed. Section 45, Chapter 93-213, Laws of Florida (1993). In its place, the Legislature enacted Section 373.403, et seq., Fla. Stat. (1993).

26. For the most part, the new statute does not seem to apply to dredge and fill per se, or docks. But Section 373.414(9), Fla. Stat. (1993), provides in pertinent part:

> The department [of Environmental Protection] and the [water management district] governing boards, on or before July 1, 1994, shall adopt rules to incorporate the provisions of this section, relying primarily on the existing rules of the department and the water management districts, into the rules governing the management and storage of surface waters. Such rules shall seek to achieve a statewide, coordinated and

> consistent permitting approach to activities regulated under this part. . . . Until rules adopted pursuant to this subsection become effective, existing rules adopted under this part and rules adopted pursuant to the authority of ss. 403.91-403.929 shall be deemed authorized under this part and shall remain in full force and effect. . . .

Section 373.414(14), Fla. Stat. (1993), adds:

> An application under this part for dredging and filling or other activity, which is submitted and complete prior to the effective date of rules adopted pursuant to subsection (9) shall be reviewed under the rules adopted pursuant to this part and part VIII of chapter 403 in existence prior to the effective date of the rules adopted pursuant to subsection (9) and shall be acted upon by the agency which received the application, unless the applicant elects to have such activities reviewed under the rules of this part as amended in accordance with sub-section (9).

27. Although under Section 373.414(9), Fla. Stat. (1993), the new rules were to have been adopted by July 1, 1994, no such rules were adopted before the Swarts filed their completed application in this case. As a result, under Section 373.414(14), Fla. Stat. (1993), the Swarts' application is reviewable under the previously existing rules adopted under the former part VIII of chapter 403. 1/

28. In this case, taking into consideration the modifications and conditions required by the DEP's Notice of Intent, the Swarts have provided the necessary reasonable assurances under F.A.C. Rule 62-312.080(1).

29. Section 373.414(1), Fla. Stat. (1993), provides in pertinent part:

> As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the [water management] district, . . . the department shall require the applicant to provide reasonable assurance that state water quality standards . . . will not be violated and reasonable assurance that such activity in, on, or over surface waters . . . is not contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by depart-ment rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.
>
> (a) In determining whether an activity . . . is clearly in the public interest, . . . the department shall consider and balance the

following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources . . .; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

(Emphasis added.)

30. Section 373.414(8), Fla. Stat. (1993), provides that, "in deciding whether to grant or deny a permit for an activity regulated under this part," the DEP "shall consider the cumulative impacts upon surface water and wetlands," including under paragraph (c) "other activities regulated under this part which may reasonably be expected to be located within surface waters or wetlands."

31. Reviewed under Section 373.414(1)(a) and (8)(c), Fla. Stat. (1993), the Swarts' application (taking into consideration the modifications and conditions required by the DEP's Notice of Intent) still should be granted, primarily because the alternative to the Swarts' proposed dock facility could be three exempt docks under F.A.C. Rule 62-312.050(1)(d) that would have more adverse impacts, individually and cumulatively. It is clearly in the public interest.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department of Environmental Protection enter a Final Order granting the application of Raymond and Nancy Swart, Trustees, (the Swarts) for a permit to construct a private multislip dock facility at their property on Little Sarasota Bay in Sarasota County, DEP File No. 5826007043, with the modifications and conditions set out in the Notice of Intent.

RECOMMENDED this 29th day of September, 1995, in Tallahassee, Florida.

J. LAWRENCE JOHNSTON
Hearing Officer
Division of Administrative Hearings
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(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of September, 1995.

ENDNOTE

1/ On the other hand, although not at issue and not raised or briefed in this case, the statutory authority for current F.A.C. Rule 62-312.030(1), would seem to be less clear to extent that the rule requires a permit for dredge and fill activities apparently not otherwise regulated under Section 373.403, et seq., Fla. Stat. (1993), after the August 7, 1995, effective date of the most recent amendments to the rule.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 95-1983

To comply with the requirements of Section 120.59(2), Fla. Stat. (1993), the following rulings are made on the parties' proposed findings of fact:

Petitioners' Proposed Findings of Fact.

(For purposes of these rulings, the unnumbered paragraphs contained in the Petitioners' proposed findings of fact are assigned consecutive numbers.)

1. Except as to the classification and designation, rejected as not proven.
2. Accepted but subordinate and unnecessary.
3. First and third sentences, accepted but subordinate and unnecessary. Second sentence, not proven.
4. Rejected as not proven and as contrary to facts found.
5. Rejected as not proven.

Respondents' Proposed Findings of Fact.

The last sentence of Proposed Finding 2 is rejected as being contrary to the greater weight of the evidence. (Obviously, no pollutants will be added from the prohibited activities, but it is possible that some pollutants may be added from other activities, although they will be relatively minor.) Otherwise, the Respondents' proposed findings are accepted and incorporated to the extent not subordinate or unnecessary.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit to the Department of Environmental Protection 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 consult with the Department of Environmental Protection concerning its rules on the deadline for filing exceptions to this Recommended Order.