

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL )  
PROTECTION, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
JOHN BROTHERTON, )  
 ) CASE NO. 96-6070  
Respondent, )  
and )  
 )  
SPORTSMAN'S LODGE DEVELOPMENT )  
CORP., )  
 )  
Intervenor. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tampa, Florida, on March 14, 1997.

APPEARANCES

For Petitioner: Albert E. Ford, II  
Assistant General Counsel  
3000 Commonwealth Boulevard  
Mail Station 35  
Tallahassee, Florida 32399-3000

For Respondent: John Brotherton, pro se  
6304 North Otis Avenue  
Tampa, Florida 33604

For Intervenor: Robert G. Southey  
Delano & Southey  
Post Office Box 15707  
St. Petersburg, Florida 33701

STATEMENT OF THE ISSUE

The issues are whether the Petitioner lawfully revoked John Brotherton's exemption for the repair or replacement of a dock in submerged lands and whether Respondent timely requested a hearing.

PRELIMINARY STATEMENT

By letter dated April 24, 1996, Petitioner informed Respondent that it was revoking a previously issued letter of exemption for a personal dock adjacent to a condominium development.

Respondent filed a petition demanding a formal hearing.

The recommended order changes the style of the case and redesignates the petitioner and respondent from the prior pleadings in order to reflect that the Department of Environmental Protection has the burden of proof.

At the hearing, Petitioner called two witnesses and offered into evidence eight exhibits. Respondent called one witness and offered into evidence six exhibits. Intervenor called two witnesses and offered into evidence three exhibits. All exhibits were admitted except Respondent Exhibits 1, 3, 5, and 6.

The court reporter filed the transcript on April 7, 1997. The parties submitted all post-hearing filings by May 8, 1997.

FINDINGS OF FACT

1. Intervenor is the successor by merger with Bankers Real Estate Investment Company. References to Intervenor shall include Bankers Real Estate Investment Company.

2. Intervenor submitted to condominium ownership the property that, following condominium construction, has become known as Sportsman's Riverside Townhomes Association (Sportsman's). This property borders the Homosassa River.

3. Subject to the legal effect of the transactions described below, Sportsman's owns the riparian rights to the area upon which a dock owned by Respondent is located.

4. By warranty deed dated February 1, 1984, David J. Steward acquired Sportsman's condominium unit five. The deed contains no reference to a dock, but conveys only unit number five and an undivided share in the common element.

5. However, by letter to Mr. Steward dated June 19, 1984, the Chairman of Bankers Real Estate Investment Corp. agreed that, in consideration of Mr. Steward's execution of amended condominium documents, the developer "will" assign Mr. Steward more parking spaces and "[y]our boat dock will remain permanently

assigned to your unit as a limited common element reserved for use by your unit."

6. On October 12, 1990, David J. Steward conveyed Sportsman's condominium unit number five to Respondent. The deed conveyed "items of personal property including the private dock thereon." On April 20, 1993, Respondent applied to Petitioner for an exemption to repair the dock that Mr. Steward had sold him. The dock had been damaged in a storm the prior month.

7. The application includes a copy of the warranty deed to Respondent. The deed reveals that Respondent owns only a single unit of a condominium project, but the application does not name the condominium association as an adjacent property owner. Respondent checked the form on the application stating that he was the record legal owner of the "property on which the proposed project is to be undertaken."

8. The application states that the dock is a floating dock for the private docking of Respondent's boat. The application reports that the dock is 128 square feet in area.

9. By letter dated June 1, 1993, Petitioner granted Respondent the requested exemption from permitting, "[b]ased solely upon the documents submitted to the Department . . . ." The letter adds that the exemption constitutes "authorization from the Board of Trustees Pursuant to a Memorandum of Agreement

entered into on November 23, 1992." The letter warns that Petitioner may revoke the exemption determination "if the basis for the exemption is determined to be materially incorrect . . . ."

10. The Memorandum of Agreement dated November 23, 1992, (MOA) is between the predecessor agency to Petitioner and the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees). In the MOA, the Board of Trustees authorizes the use of state-owned submerged lands for all activities (subject to irrelevant exceptions) for which Petitioner grants exemptions from environmental resource permitting.

11. By letter dated April 24, 1996, Petitioner informed Respondent that it had learned that Respondent had supplied "materially incorrect" information in the application submitted with the April 20, 1993, letter. The April 24 letter explains that Respondent asserted in the application that it was the record owner of the property, but the warranty deed revealed that he was not. The April 24 letter gives Respondent 21 days from receipt within which to file a petition requesting a formal administrative hearing.

12. Respondent timely filed his request for a hearing. The facts do not establish a waiver of Respondent's right to demand a hearing.

13. Petitioner did not rely on Respondent's representation that he was the owner of the property on which the dock was located. The warranty deed attached to the application clearly revealed that Respondent owned only a condominium unit and undivided interest in the common element. Petitioner also knew that the state owned the submerged land at the dock.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes.)

15. Rule 18-21.004 contains the rules governing requests for activities on state-owned submerged lands. Rule 18-21.004(3)(b) states:

Applications for activities on sovereignty lands riparian to uplands can only be made by and approved for the upland riparian owner, their [sic] legally authorized agent, or persons with sufficient title interest in uplands for the intended purpose.

16. Petitioner's witnesses testified that Rule 18-21.004(3)(b) requires ownership of the upland property. This is the meaning of the first two clauses, but the last clause broadens the category of permissible applicants. "Sufficient title interest in uplands for the intended purpose" requires a

functional inquiry to determine if the interest of the applicant is sufficient to allow it to repair the dock.

17. Real estate title determinations are the jurisdiction of circuit courts. Agencies may determine whether an applicant possesses sufficient ownership of land to entitle the applicant to a permit, but this determination in no way affects the actual ownership of the land.

18. In this case, Respondent has shown sufficient legal interest to allow him to repair the dock. He may have obtained a license or prescriptive rights to use the dock. Perhaps he has a stronger legal interest. Respondent has shown sufficient interest in the dock and land to satisfy the requirement of the rule. If Respondent lacks sufficient interest to repair and use the dock, it is up to a circuit court, not a state agency, to so rule. If a circuit court later determines that Respondent lacks the necessary interest to repair and use the dock, then, following a judgment to this effect, Petitioner may bring another proceeding to revoke the exemption of Petitioner and consent of the Board of Trustees.

#### RECOMMENDATION

It is

RECOMMENDED that the Department of Environmental Protection enter a final order dismissing the proceeding seeking the

revocation of the exemption from the Department and consent from the Board of Trustees.

ENTERED in Tallahassee, Florida, on June 10, 1997.

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ROBERT E. MEALE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
on June 10, 1997.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.