STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MEL and PAMELA McGINNIS,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 97-1894
	)	
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
MANASOTA-88, INC.,	)	
	)	
Intervenor.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, this case was heard by the Division of Administrative Hearings, through its designated Administrative Law Judge, David M. Maloney, on January 13 and 14, 1998, in Tampa, Florida.

APPEARANCES

For Petitioners: Frank E. Matthews, Esquire
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For Intervenor: Thomas W. Reese, Esquire
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STATEMENT OF THE ISSUES

Whether the Mosquito Ditch Exemption of Section 373.4211(25), Florida Statutes, applies so as to exclude Petitioners' property adjacent to Miguel Bay in Manatee County from the permitting authority of the Department of Environmental Protection? If not, whether Petitioners are entitled to an Environmental Resources Permit from the Department?

PRELIMINARY STATEMENT

On April 18, 1997, The Division of Administrative Hearings received from the Department of Environmental Protection (DEP or Department) a document entitled, "Request for Assignment of Administrative Law Judge and Notice of Preservation of Record." Attached to the request was a Petition for Formal Administrative Hearing filed by Mel and Pamela McGinnis with the Department.

In the petition, the McGinnises contested the preliminary denial by the Department of their application in Permit File No. 412783533. The petition related that they had "initially requested an exemption from the requirement to obtain an Environmental Resource Permit (ERP). . . [and] [a]s an alternative, and as required by DEP, . . . submitted an ERP permit application." Petition, p. 2. After alleging disputed issues of fact and citing law requiring reversal of the Department's proposed action, the petition demanded all appropriate relief including the specific relief that either the

activities the McGinnises proposed be found exempt from permitting by DEP or that the permit requested be granted.

The Department's request, in turn, asked that the Division of Administrative Hearings designate an administrative law judge to conduct all proceedings required by law. The request was honored; the matter was assigned Case No. 97-1894 and the undersigned was designated to conduct the proceedings.

The matter was noticed for hearing in Tampa for two days in September. In the meantime, Manasota-88, Inc., moved for leave to intervene. The motion was granted "subject to proof of standing at hearing." Following an unopposed motion by Manasota-88 for a continuance, the case was re-set for hearing for January 13 and 14, 1998.

At final hearing, Petitioners presented the testimony of three witnesses: Pamela McGinnis; Larry Rhodes, an expert in mosquito control; and John Benson, an expert in civil engineering. Petitioners' Exhibits 1(A) through 1(O), 2(A) through 2(C), 3(A) through 3(G), and 6 were admitted into evidence. Objection to the introduction of Petitioners' Exhibit 5, a report to the Governor from the Chief Inspector General for the state, was sustained and the exhibit was rejected. The exhibit was proffered by Petitioners.

Petitioners' Exhibit 4, a Special Master’s Report following a proceeding conducted under the Florida Land Use and Environmental Dispute Resolution Act, Section 70.51(19), Florida

Statutes, was admitted over the relevancy objections of the Department and Intervenor. But the objections were treated as motions to strike with leave to the parties to submit memoranda on the issue. Upon review of the memorandum of law submitted by Petitioners on February 12, 1998, the report is now admitted in part, although the evidence is of no use in the case since the Department, by written order, declared the report and the proceeding, null and void. (See Paragraphs 74 - 79, in the Conclusions of Law, below at pgs. 27 - 28.)

In defense of its preliminary action, the Department presented the testimony of Ken Huntington, an environmental manager with the Department and an expert in the environmental impacts of dredging and filling; Robert Evans, an expert in aerial photo interpretation and imaging analysis; Juan Vega, an expert in soils; and Rick Cantrell, an expert in wetlands delineation including aerial photo interpretation of wetlands. Respondent's Exhibits 1 - 11 were admitted.

Offering no testimony or exhibits of its own, Manasota-88 adopted the evidence of the Department. Proposed recommended orders were timely served by all parties, the last received in the Division of Administrative Hearings clerk's office on February 13, 1998.

FINDINGS OF FACT

a. The Property

1. Not far from the southern terminus of the Sunshine Skyway Bridge spanning the waters where Tampa Bay and the Gulf of Mexico meet is a subdivision known as San Miguel Estates. On the western shore of Terra Ceia Island in Manatee County, it takes its name from an adjacent body of water: Miguel Bay.

2. Miguel Bay is classified by rule of the Department of Environmental Protection as Class II surface waters meaning it has been designated usable for "Shellfish Propagation or Harvesting," Rule 62.302-400(1), Florida Administrative Code. The classification is the highest available to surface waters which are not fresh. As a part of the Terra Ceia Aquatic Preserve, Miguel Bay also enjoys the status of an Outstanding Florida Water, so designated by the Environmental Regulation Commission to confirm its worthiness to receive special protection because of natural attributes. See Rules 62-302.200(17) and 62-302.700(9)(h)39., Florida Administrative Code.

3. The bay surrounds the subdivision together with two bayous, Custer to the northwest and Tillette to the southeast. The mouth of Tillette Bayou is formed by Boots Point, also a part of Terra Ceia Island and the subdivision jutting into the bay directly north of the point. The bay surrounds or washes onto

the shores of a number of keys: Sister, Skeet, Ed's, and Rattlesnake.

4. Through the middle of the subdivision runs a county-maintained road: Miguel Bay Drive. It provides access to a cul-de-sac containing seven lots. Lots 2, 6, 7, and 8 are fully improved with residential structures, boat docks and elevated walkways. Lots 3 and 4 are undeveloped. An application for a permit to construct a house on Lot 3 was denied in the early part of this decade. It is uncertain whether Lot 4 is permitted for a residential structure but an application for a permit to construct a boardwalk on the property is pending. The lot owned by the petitioner and his wife, also undeveloped, is Lot 5.

5. Consisting of approximately 5.5 acres on the south side of Miguel Bay Drive, Lot 5 is within the geographical jurisdiction of the Southwest Florida Water Management District. It contains wetlands contiguous to the bay. The wetlands have suffered various disruptions over the years. In addition, to mosquito ditches dug more than 30 years ago, a dike was built around the same time to prevent the gulf tide from flowing onto the property. Furthermore, part of the property was cleared at one time as part of an agricultural venture.

6. On its northern side, adjacent to Miguel Bay Drive, is the property’s approximate 0.9 acres of uplands. On the opposite side of the lot, where the wetlands meet the bay, the Petitioners plan a boat basin. A section of the proposed boat channel

serving the basin, where it connects to the bay, is located within the Outstanding Florida Waters boundary of the bay. The boat basin will be part of a residential project planned by Mr. and Mrs. McGinnis. In addition to an access drive and the boat basin and channel, the Petitioners plan to build a house in the middle of the lot.

7. In the mid-1960's, Lot 5 was ditched for mosquito control. The mosquito control ditches transect the property along two lines running roughly east-west: one, just to the south of the uplands, not too far from the road; the other, just to the north of the dike and a mean high-water line approximated by Mr. and Mrs. McGinnis' engineer, John Benson.

b. Valuable Mangroves

8. Mangroves cover the bulk of the property south of the uplands. Most are normal-sized. For example, "[a]ll the mangroves up . . . at the mosquito ditch going toward the . . . street [are] huge, . . . 10, 15, 20 feet." (Tr. 41.) The mangroves closer to San Miguel Bay, too, are normal-sized. But in a basin in the center of the property there is an acre or so of "stunted mangroves that [are] only . . . three to four feet tall." (Tr. 39.) "And that [is] very unusual . . . there [is] obviously something wrong with them." (Tr. 40-41.)

9. The problem for the stunted mangroves is stress in their root zone due to "anoxia in the soil, that is, lack of oxygen." (Tr. 318). The anoxia is most likely a function of location: the stunted mangroves are in a basin surrounded by the mosquito ditches. The normal-sized mangroves are not experiencing anoxia because they are better irrigated. Those alongside or in the mosquito ditches are irrigated by the water which collects in the ditches while those in the southernmost part of the property are irrigated by tidal froth from the bay.

10. Although the property has been ditched, diked and bermed (and may have even been tilled at one time for agricultural purposes after it was cleared), the mangroves on the property serve a valuable ecological function, particularly to the bay. The height of the mangroves does not alter their ecological value because the value is largely in their root system. The entire root system of the mangroves covering over four-fifths of the property serves as a filtration base for water running off the uplands. It provides, moreover, critical habitat for commercially important species such as redfish and snook.

11. Building a residence in the middle of this mangrove swamp, even were it to disrupt only the stunted mangroves, would cause adverse ecological impact. The adverse impact would fall heavily on the bay because it needs the natural flushing action allowed by the uninterrupted tangle of mangroves covering more

than four acres of the five and one-half acre plot. At the same time, wildlife enjoy orderly habitat in the mangroves on the property. The presence of a residence and the alterations to the property, particularly the loss of well over an acre of a mangrove root-system caused by dredging and filling to support the residence, would render the remaining mangrove wetlands on the property much less supportive of the wildlife inhabiting it now and the wildlife that would otherwise inhabit it in the future.

c. The Parties

12. Petitioners moved to Florida from Illinois in 1991. Mel McGinnis is a double above-the-knee amputee who walks with the aid of prosthetic devices. Pamela McGinnis is a licensed real estate broker. Mr. and Mrs. McGinnis live in Palmetto where Mrs. McGinnis conducts her real estate business.

13. The Department of Environmental Protection is the state administrative agency with permitting authority under Part IV of the Florida Water Resources Act of 1972, Chapter 373, Florida Statutes and Chapters 62-330, 62-341 and 62-343, Florida Administrative Code, as well as Section 404 of the federal Clean Water Act (33 U.S.C. 1344). Pursuant to operating agreements executed between the Department and the Southwest Florida Water Management District (SWFWMD) via the authority of Chapter 62-113, Florida Administrative Code, the Department is responsible in

this case for reviewing the permit application of the Petitioners.

14. Manasota-88, Inc., filed a petition to intervene which was granted subject to proof of standing at hearing. No proof of standing was offered, however; Manasota-88's status as an Intervenor has been rescinded and it has been dismissed as a party to the proceeding. See Paragraphs 78 - 81, below in the Conclusions of Law section of this order.

d. Acquisition of the Property

15. In 1993, Mel and Pamela McGinnis purchased Lot 5 in San Miguel Estates. They were attracted to the lot because of the more than 500 feet of waterfront it enjoyed on Miguel Bay.

16. The seller of the property was the federal government. The sale was arranged through the United States Marshall’s office as part of a forfeiture proceeding. The property had been seized by federal authorities because of the illegal involvement in drug activity of its owner at the time of the seizure.

17. Prior to a decision to make the purchase, Mr. and Mrs. McGinnis were concerned about clear title because of the property's shadowy history. They researched the matter at the county offices. Their concerns were allayed when they found no liens and discovered the property was part of a platted subdivision. They inquired whether there would be water or sewer services provided by local government. The county reported plans to put water lines in soon, a promise made good in 1994. In

testimony, Mrs. McGinnis summed up the results of the pre-purchase investigation: "We really didn't perceive [there] to be a problem." (Tr. 22.)

e. Plans to Develop and an Application for an ERP

18. In 1995, the McGinnises began planning the construction of the residential structure and boat dock on Lot 5. Accompanied by their engineer, John Benson, they met on the site in August of 1995 with Ken Huntington, an environmental manager in the Environmental Resources Permitting Section of the Department.

19. Before the meeting, the McGinnises believed the mosquito ditches to be creeks. After John Benson corrected the misimpression, Mr. Huntington indicated there was a possibility the property might qualify for a mosquito ditch exemption from environmental resource permitting. Mr. Huntington did not make a commitment, however, at this early stage of the case's development that the Department would determine the exemption applied. In fact, the Department insisted that an application for an Environmental Resources Permit be filed before a decision could be made on the exemption.

20. Mr. and Mrs. McGinnis, on October 5, 1995, applied for the Environmental Resource Permit. The application sought authority to dredge and fill in waters of the state for the purpose of constructing a single-family residence, driveway, swimming pool and boat channel and basin. It showed the construction to have impact upon approximately 1.61 acres of

wetlands. About 1.39 acres of the affected area would be cleared and filled for the construction of the home, pool, and driveway. The remainder of the area under impact (about .22 acres) would be excavated for the construction of the boat basin and channel.

21. Two months later, in December of 1995, Mr. and Mrs. McGinnis submitted additional application materials. The submission consisted of several parts: a written statement from Larry Rhodes, the Mosquito Control Director for Manatee County from 1961-94; a proposed work order of the mosquito control district from 1966; information from their engineers; and, aerial photographs from 1960 and 1965. These materials were intended to support the assertion that Lot 5 was eligible for a mosquito control exemption from Environmental Resource Permitting.

f. Preliminary DEP Action

22. On April 1, 1996, a Preliminary Evaluation Letter was sent to Petitioners by the Department. The letter stated that based on site inspection, "it appears that the project cannot be recommended for approval." Petitioners' Exhibit 1-h. Cautioning that the preliminary evaluation did not represent final agency action, the letter went on to provide modifications which would reduce or compensate for the project's negative impacts. Among them, was "relocation of the proposed structure to a more landward location." Id.

23. The letter was not preliminary in one way. It explained the Department's final position that the project site did not qualify for the mosquito ditch exemption:

> As indicated in previous Department correspondence of January 19, 1996, the Department does not believe that the project meets the . . . exemption. Pursuant to 40D-4.051(14), Florida Administrative Code, the subject exemption applies only to 'lands that have become surface waters or wetlands solely because of a mosquito control program, and which lands were neither wetlands nor other surface waters before such activities . . .' Historical aerial photographs do not support that the parcel was not previously wetlands.

Id., at pg. 2.

24. Ten days later, Mr. and Mrs. McGinnis, through their attorneys, requested a one-week extension to submit revised plans "which attempt[] to reduce the impacts in response to the issues . . . raised [by the April 1 correspondence]." Petitioners' Exhibit 1-i.

25. In a letter dated April 17, 1996, Mr. McGinnis submitted the revised plans in the form of proposals designed by Benson Engineering and CCI Environmental Services. As a prelude to the proposed modifications it had designed, Benson Engineering wrote,

> We have spent considerable effort to reduce the negative impacts with out (sic) placing the development in the unacceptable upland. The location of the residence has been chosen due to the nature of the stressed mangroves. This area (approximately 1.6 acres) is characterized in a report by H. Clayton Roberson, Environmental Scientist with CCI Environmental Services, Inc. dated 29

> January, 1996. The majority of the mangroves to be impacted are less than 3 feet in height, with atypical stunted growth. The current proposal reduces the impacts to only 45% of the stressed area, and only 24% impact to the total site. This 24% development ratio is also being mitigated with enhanced water circulation to the entire site, . . .

Petitioners' Exhibit 1-j.

26. In the cover letter submitting the proposed modifications, Mr. McGinnis' frustration at this point with the process was evident. At least two of the items in the letter demonstrate its depth:

> 1) Property was purchased by us from the government with no disclosure by anyone or any recorded documentation that would have given us even a hint that building our home would become such a nightmare.
>
> 2) This property is in a long established recorded subdivision, and all adjacent property owners are either built, under construction or permitted to build. Our property as submitted to you under the revised design is compatible with the surrounding neighborhood. Placement of any dwelling on the road will have a major negative impact on this parcel. I cannot stress enough the negative economic impact that would be incurred by this action.

Petitioners' Exhibit 1-j.

g. Denial

27. On May 1, 1996, the Department issued its Notice of Denial. The notice contained five parts: I. Description of the Proposed Activity; II. Authority for Review; III. Reasons for Denial; IV. Proposed Changes; and V. Rights of Affected Parties.

28. Part III of the notice (Reasons for Denial) cited a June 1995 site inspection. It included a description of the site: 5.5 acres, the majority of which, according to a 1952 Soil Conservation Service survey, is Tidal Swamp, and according to a 1983 Soil Survey is classified as Wulfert-Kesson Association soils. The site had been found during the inspection to be dominated by mangroves, red, black and white. Other vegetation associated with wetlands had been observed "within the subject system at the time of inspection" (Petitioners' Exhibit 1-k) as well as Marsh periwinkle, Fiddler crabs, tricolered heron, greenback heron, and snowy egret.

29. The project was found, moreover, to result in 1.61 acres of impact to a mangrove community with wetlands in a Class II waterbody directly contiguous to an aquatic preserve.

30. After detailing the value and significance of mangroves to habitat and water quality functions and the applicant's failure to provide reasonable assurance that the construction and operation of the activity, considering direct, secondary and cumulative impacts, would comply with the provisions of Part IV of Chapter 373 and the rules adopted thereunder, Part III of the notice recited two primary bases for the denial. First, the immediate and long-term impacts of the activity were expected to cause violations of water quality standards. Second, the project was found to be contrary to the public interest for those

portions of the activity located in, on or over wetlands or other surface waters.

31. With regard to water quality, the Department found the project did not meet standards applicable to biological integrity, transparency, and turbidity. The project was expected, furthermore, to cause: adverse water quality impacts to receiving waters and adjacent lands; adverse impacts to the value of functions provided fish, wildlife and listed species by wetlands and other surface waters; and adverse secondary impacts to water resources.

32. With regard to the public interest test for those portions of the activity located in, on or over wetlands or other surface waters, the Department expected the project to adversely affect the conservation of fish and wildlife, including endangered or threatened species and their habitats; adversely affect navigation or the flow of water or cause harmful erosion or shoaling; adversely affect the fishing or recreational value or marine productivity in the vicinity of the project, among other adverse impacts; and fail to meet standards imposed by law.

33. Despite the existence in the Department's opinion of numerous substantial bases for denial, the Department offered hope to Petitioners that they might yet be able to build a residential structure on Lot 5. The first of changes to the project listed in the notice that might "enable the Department to grant a permit," Petitioners' Exhibit 1-k, was for Petitioners

to "[r]elocate the proposed residence to a landward location-in proximity to the existing road which would result in a significantly minimized wetland impacts." Id. Other modifications included submission of an acceptable mitigation plan and addressing cumulative impacts, perhaps by way of granting a conservation easement.

34. In response, the McGinnises modified their proposal. But the modifications did not include moving the residence into the uplands at the northern end of the property. The Department considered the changes to the proposal but the changes did not, in the Department's view, make the project permittable. (See Tr. 155).

h. Environmental Dispute Resolution

35. On May 15, 1996, a few weeks from the issuance of the Department's Notice of Denial, Mel and Pamela McGinnis filed a Request for Relief under the Florida Land Use and Environmental Resolution Act, Section 70.51, et seq., Florida Statutes.

36. The Department filed a response to the request and parties participated in a hearing and mediation in accordance with the Act.

37. A hearing was held on September 18 and 19, 1996, before Special Master Raymond M. McLarney who referred to the event as the "first Special Master Proceeding in Property Rights with the FDEP and a landowner." Petitioners' No. 4, Special Master Summary Report, Ex. 1a, p. 1.

36. Paragraph 4 of the Report Summary, bearing the heading, "Special Master's Initial Observation," states:

> Following completion of the hearings . . ., the Special Master concluded and communicated to the parties that the FDEP's Notice of Denial unreasonably and/or unfairly burdens use of the McGinnises['] real property. The Special Master's initial observation and conclusion was provided to the parties to serve as an indication of sufficient hardship to support modification, variances or special exceptions to applicable statutes, rules, regulations or ordinances of FDEP as applicable to the subject property, all as authorized by Section 70.51(25) of the Florida Statutes. The Special Master encouraged the parties to mediate their differences and attempt to seek a mutually-acceptable solution through the process of mediation. The parties agreed.

Id., at 4. The Special Master's Report Summary reports that the result of the mediation was that "the McGinnises and FDEP reached a mutually-acceptable solution evidenced by an [attached] agreement . . . incorporated herein. The . . . solution . . . was initialed/signed on each page by authorized representatives of the parties and was accomplished in accordance with Section 70.51(19)(c) of the Act." Id., at 5.

39. The “Initial Observation” section of the Report Summary appears to contain what would have been the Special Master’s Recommendation (that is, the conclusion that the Department’s actions “unfairly burdened the Petitioners’ use of the property”) had the Special Master not thought that the Department and the McGinnises had reached a mediated agreement. Whatever the appropriate characterization of this section of the report, the

Department treated it as a recommendation. It did so when it declared the Special Master's Report Summary null and void several months after receiving it.

i. Null and Void

40. On January 29, 1997, the Department received the Special Master's Report Summary. By order dated March 14, 1997, the Department rejected its "recommendations." Petitioners' Exhibit 4, Order, p. 1.

41. Under an overarching declaration that the report summary was null and void (amounting to a declaration that the entire proceeding was null and void) the order detailed essentially four bases for the rejection: a. the hearing that led to it was not open to the public as required by the Act; b. the report was not timely submitted; c. the proceeding had not satisfied other requirements of the Act besides public openness and therefore was inadequate; and d. the report incorrectly concluded that the Department and the McGinnises had reached a mutually-acceptable solution.

j. Allegations of the Petition

42. In the body of the petition which initiated this case, Petitioners refer to the Special Master proceeding as one which led to a mediated agreement. They also make reference to the Department's rejection of the Special Master's recommendation. See Petition, paragraph 11, p. 3. But although they seek "[s]uch other relief as may be just and appropriate under the

circumstances [of the case],” Petition, paragraph 12.c., p. 5, they do not plead in the petition that the rejection was either wrong as matter of law or action for which they specifically seek relief.

43. Instead of challenging the Department’s rejection of a recommendation by the Special Master or the Department’s declaration that his Report Summary was null and void, the petition challenges only two decisions of the department. One is the Notice of Denial determining the Petitioners not entitled to an Environmental Resource Permit. The other is the decision that the project is not exempt from permitting because of effects caused by the mosquito control ditches.

k. The Days of Mosquito Ditching

44. Long before the Legislature enacted the Florida Land Use and Environmental Dispute Resolution Act to address unreasonable burdens placed on land owners by governmental regulation, local governments were confronted by issues less abstruse. The Manatee County Commission, for example, was striving to eradicate mosquito infestation along its coastline.

45. One of the tools the county used in its efforts was ditching. Mosquito ditches were installed in uplands and fresh waters throughout Manatee County but they were excavated mainly in the salt marshes along the county’s coastline because "the biggest [mosquito] problem in Florida is coastal mosquitoes." (Tr. 105).

46. Larry Rhodes, presently a resident of Terra Ceia and a long-time resident of the area, was the Director of Manatee County Mosquito Control at the time the mosquito ditches were dug across the McGinnis property. His tenure as director ended in 1994. It spanned a period of more than 33 years, having begun in 1961.

47. Shortly after the commencement of Mr. Rhodes' tenure, but prior to some of the canal construction by the developers of nearby Terra Ceia Estates, the McGinnis property was cleared almost entirely. Except for a small wet area of black mangroves, the property had been dominated by wax myrtle, guava and Brazilian Pepper, an invasive exotic in the process of pushing out the other dominant species.

48. The clearing by the developers of Terra Ceia Estates, personally observed by Mr. Rhodes, was done at the time of installation of a system of canals. Around the canals a waterward dike was placed in order to keep the tides from Miguel Bay from inundating the property. The clearing shows up in an aerial photograph taken in 1965.

49. Soon after the aerial was taken and developed, the mosquito ditches were excavated. Approved by the State Board of Health in 1966, the ditches were dug through the McGinnis property during that year or the next, when the mosquito ditch system in the area of San Miguel Estates was completed in 1967.

50. As the result of the ditching, with the exception of the spoil banks where Brazilian Pepper took over, mangroves proliferated over the formerly-cleared land. Red mangroves grew "up [in] all the ditches and then black and white mangroves in other areas." (Tr.122).

l. Maps, Aerial Photographs, and Soil Surveys

51. The status of the property as cleared thirty-odd years ago and the subsequent generation of mangroves produced in the intervening years over most of the property, including alongside and in the mosquito ditches, did not mean necessarily that the cleared area had not been wetlands prior to the clearing activity.

52. The Department, therefore, confronted with the Petitioners' claim of a mosquito control exemption, set out to investigate. The investigation was necessary because entitlement to the exemption turns on whether the nature of the property as wetlands after the clearing was due solely to the excavation of the ditches. The investigation consisted of reviewing aerial photographs, maps and soil surveys and later required resort to expert opinion from outside the department.

53. After an initial review conducted by Ken Huntington and Rose Poyner, another Department staff member, the Department contacted GIS analyst Robert P. Evans of the Southwest Florida Water Management District. As a GIS analyst, Mr. Evans' primary

functions (conducted for more than 25 years for the district) are GIS mapping and interpretation of aerial photographs.

54. Mr. Evans reviewed a series of aerial photographs beginning with 1940 black and white photographs and ending with infrared photos from 1990. A 1940 Natural Resource Conservation Service (NRCS) photograph showed that the site of the McGinnis' proposed project consisted of mangroves that year. A copy of a 1951 NRCS aerial photo showed mangroves on the site as did a copy of a 1957 aerial photo. After review of the photos, Mr. Evans was of the opinion that the site of the proposed project was wetlands and had been so historically, that is, before the ditches approved and excavated in the mid-sixties.

55. Rick Cantrell, the Administrator of the Wetlands Evaluation and Delineation Section of the Department, the "Administrator [of wetlands delineation] for the whole Department in the whole State of Florida," (Tr. 306), and an expert in aerial photo interpretation for purposes of wetlands delineation, also reviewed aerial photos of the site. Mr. Cantrell reached the opinion that the property had been historical wetlands, just as had Mr. Evans.

56. In the meantime, Mr. Evans was hard at work seeking independent confirmation of his opinion. First, he reviewed United States geological surveys of the site. The 1969 revision of the 1964 edition of the Palmetto USGS Quad map of the area,

based on an aerial photograph taken in 1951, shows the McGinnis project site was wetlands prior to the ditching.

57. Not content to rely on the authoritative evidence of aerials and official federal geological survey maps, Mr. Evans sought out another source: soil surveys. These, too, confirmed the historic existence of wetlands on the site.

58. Favored with Mr. Evans' opinion, the Department contacted Juan Vega, a soil scientist, and asked him to use his expertise in both soil survey review and site testing to assist the inquiry.

59. Mr. Vega agreed to look into the issues. He examined two soil surveys: a survey of Manatee County soils issued in December of 1958 by the United States Department of Agriculture's Soil Conservation Service in cooperation with a Florida Agricultural Experiment Station (Respondent's Exhibit 8) and a subsequent Soil Survey of Manatee County conducted by the federal Soil Conservation Service in cooperation with the University of Florida and other state entities (Petitioner's No. 9). The second survey, "done in '79 or '80," (Tr. 286) was a recorrelation of the first.

60. The first survey shows the site to be tidal swamp as is all of Lot 5 with the exception of the less than one acre of uplands on the property's northern border.

61. Vegetation in tidal swamps is usually mangroves in abundance. As one would expect from their denomination, tidal

swamps are influenced by salt water tides, contain tidal soils and are generally wet.

62. The 1979-80 survey indicated that the soil found on the site is Wulfert-Kesson Association. This soil is characterized by an accumulation of organic materials and ore black minerals on the surface, a process known as gleying. Gleying is caused by saltwater inundation and tidal effects and therefore, of course, is indicative of the presence of hydric soils in a wet area. The soil surveys led Mr. Vega to conclude that the site of the project was composed of historic wetlands.

m. Field Testing

63. The Department's interest in having Mr. Vega conduct soil testing on the site of the project was not fruitful. Access to the site was denied.

64. In lieu of on-site testing, therefore, Mr. Vega conducted soil analysis nearby, a few hundred feet to the east of the proposed site. In March of 1996, he dug several holes, one near the road and others adjacent to the mangrove area of Lot 5. The soil near the road was Bradenton, "pretty much natural native soil." (Tr. 289).

65. The soil from the other areas, buried under approximately two feet of fill, was Wulfert and Kesson, both hydric soils. There was also present a layer of muck, that is, decomposed organic material. It indicated that the soil had not

been converted from uplands to wetlands but rather that the soil had been wetlands historically.

66. The field testing conducted by Mr. Vega on the adjacent site confirmed his opinion that the site of the proposed McGinnis project was wetlands and had been so historically.

n. Historic Wetlands

67. The evidence on the issue of the property's status is summarized as follows: United States Geographical Survey maps indicate the area of Lot 5 in San Miguel Estates to be historic wetlands; federal soil surveys confirmed by nearby soil testing and conducted with the cooperation of the State of Florida indicate the presence of hydric soils on the lot; and aerial photographs show that mangroves existed on the site both before the clearing in the sixties and after the mosquito ditches were excavated in 1966-67.

68. Although the proposed site contains mangroves stunted and suffering from the stress of anoxia today, and there are mangroves in and alongside the mosquito ditches dug as part of a governmental program in the 1960s which grew after the land had been cleared, Lot 5 in San Miguel Estates, with the exception of the approximate .9 of an acre alongside the road at the north end of the property, is comprised of wetlands that existed prior to the mosquito ditching activity. In short, Lot 5 is comprised of historic wetlands.

o. The Permit Application

69. Sovereign submerged lands would be affected by the project, a project permanent in nature. "[D]irect impact would be the excavation of the access channel from the boat basin to the water. So that last [scoop] of dirt, if you will, or piece of land separating the basin from Miguel Bay, that cut would be into the bottom of Miguel Bay, [an Outstanding Florida Water and part of the Terra Ceia Aquatic Preserve]." (Tr. 156).

70. The proposed project would cause adverse impact to the quality of the receiving waters. The filtration function of the mangrove forest would be diminished and the boat basin would cut into the bottom of the bay within the aquatic preserve. Petitioners offered no evidence that water quality standards listed in Chapter 62-302, Florida Administrative Code, including those for biological integrity, transparency and turbidity would be met, all concerns listed by the Department in its Notice of Denial as a basis for its action on the permit application. Nor did Petitioners demonstrate that the dredging of the boat access channel in Miguel Bay would not violate ambient water quality standards, another basis for the Department's notice of denial.

71. Any mitigation offered by Petitioners for the impacts of fill associated with construction of the access road and fill pad for the house were not adequate. "That fill will eliminate over half an acre . . . of mangroves and wetlands that are

crucial to the eco system (sic) in Miguel Bay." (Tr. 157). In addition to the filtration these lost mangroves would have provided, "mangrove wetlands are vital for habitat, for fish and wildlife services." Id.

72. Petitioners have not provided reasonable assurance that the boat basin would not create water quality violations, including dissolved oxygen concentrations falling below standards.

73. Petitioners have not provided reasonable assurance that the proposed activity will not cause adverse secondary impacts that result from construction activities on the site. Secondary impacts include the establishment of nuisance species in disturbed areas.

74. The property contains sufficient uplands upon which to construct the residential structure or at least enough of it to greatly minimize impact to wetlands. Siting a dock on the bay would obviate the need for the boat basin and channel. An associated boardwalk would eliminate the need to dredge wetlands populated by mangroves. Utilizing a dock and a boardwalk would save almost a quarter of an acre of wetlands from dredging. Mr. McGinnis' status as a double above-the-knee amputee may certainly be expected to create special needs, but other than to mention his disability, Petitioners made no showing that such a modification was not practicable in light of his condition.

75. The proposed project would also present cumulative impacts to wetlands and other surface waters. There is significant development already in San Miguel Estates and there are other applications for development pending: for example, a permit application for construction of a boardwalk through wetlands submitted for the adjacent Lot 4.

76. In sum, the project will have adverse water quality impacts, impacts to sovereignty submerged lands, secondary impacts, and cumulative impacts. Ways proposed by the Department of dramatically minimizing, reducing or preventing these impacts have not been accepted by Mr. and Mrs. McGinnis.

CONCLUSIONS OF LAW

p. Jurisdiction

77. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case. Section 120.57, Florida Statutes.

q. Standing of Manasota-88, Inc.

78. Standing to intervene in an administrative proceeding must be proven. Royal Palm Square Association v. Sevco Land Corporation, 623 So. 2d 533 (Fla. 2d DCA 1993), rev. dism'd, 639 So. 2d 981. In addition, to meeting the requirements for standing under the Administrative Procedure Act, an association must demonstrate that a substantial number of its members would have standing. Friends of the Everglades, Inc. v. Board of Trustees et. al., 595 So. 2d 186 (Fla. 1st DCA 1992).

79. In keeping with case law, Manasota-88, Inc.'s petition to intervene was granted "subject to proof of standing at final hearing."

80. Manasota-88, Inc., however, did not attempt at final hearing to prove its standing to intervene in this proceeding. It presented no evidence of its own. Instead, it opted to adopt the testimony and exhibits introduced into evidence by the Department. None of the Department's evidence proved Manasota-88 has standing to intervene.

81. Manasotaa-88, Inc.'s status as an Intervenor in this case is rescinded and it is dismissed from the proceeding.

r. Admissibility of the Special Master's Report Summary

82. The Department objected to the admission into evidence of the Special Master's Summary Report in the proceeding conducted under Section 70.51, Florida Statutes.

83. Although this is a case of first impression, it appears clear from the Florida Land Use and Environmental Dispute Resolution Act that at least that much of the report which constitutes the Special Master's "recommendation" is admissible.

84. The recommendation is admissible because it is a public document. (Note, however, the provision which declares it so, Section 70.51(20), Florida Statutes, also declares that "actions or statements of all participants to the special master

proceeding are evidence of an offer to compromise and inadmissible in any proceeding, judicial or administrative.") Second, as pointed out by Petitioners in their cogent post-hearing memorandum of law on the issue, Section 70.51(25), Florida Statutes, provides that "regardless of the action the governmental entity takes on the special master's recommendation, a recommendation that [DEP] action . . . is unreasonable or unfairly burdens use of the owner's real property may serve as an indication of sufficient hardship to support modification, variances or special exceptions to the application of statutes, rules, regulations or ordinances to the subject property."

85. Despite the admissible status of the Special Master's recommendation, the offer into evidence by Petitioners of the Special Master's Report Summary is beset with difficulty. First, the document does not contain a section devoted to the Special Master's recommendation but only to "initial observation." This problem may be cured by the section's conclusions treated later by the Department as a recommendation. Second, the statue requires the exclusion from evidence of portions that might consist of actions and statements of the parties, none of which are clearly identified in the report. Third, and the most troubling aspect of the Petitioners' attempt to admit the summary report is the question of to what use it can be put since the Department by an unchallenged, unappealed, final order declared

the entire report summary, recommendations and all, null and void.

86. Perhaps a scholarly parsing of the Act in search of an answer to these questions is needed. In the interim, the long and the short of the issue is that while any recommendation might be admissible in this case, the recommendation is not of any use. It was rejected by a final order of the Department, an order in effect for all that is evident in this proceeding, and one which did much more than simply reject the recommendation. The order declared the Special Master's Report Summary, and in essence the entire proceeding, null and void.

87. The Special Master’s Report Summary, therefore, although admissible in part, is disregarded in its entirety. It is of no use in the proceeding due to the Department’s final order declaring the report null and void, an order which preempts any use to which the Special Master’s recommendation might be put in this case.

s. The Mosquito Ditch Exemption

88. Construction in, on or over lands that become surface waters solely because of mosquito control activities undertaken as part of a governmental mosquito control program are exempt from Department permitting requirements. The exemption applies only when the wetlands exist as the result of the ditching that was part of a governmental program, as the statute makes clear:

> The first sentence of Rule 17-340.7350, Florida Administrative Code, is changed to read:
>
> "17-340.750 Exemption from Surface Waters or Wetlands Created by Mosquito Control Activities.
>
> "Construction, alteration, operation, maintenance, removal, and abandonment of stormwater management systems, dams, impoundments, reservoirs, appurtenant works, or works, in, on, or over lands that have become surface waters or wetlands solely because of a governmental mosquito control program, and which lands were neither surface waters nor wetlands before such activities, shall be exempt from the rules adopted by the department and water management dist3ricts to implement [the law]."

Section 373.4211(25), Florida Statutes, (emphasis supplied).

89. Put another way (also clearly enunciated by the statute), the mosquito ditch exemption does not apply to those areas that were surface waters or wetlands prior to the mosquito control ditching activities.

90. A party seeking an exemption has the ultimate burden of proof in demonstrating entitlement to it. Friends of the Hatchineha v. State Department of Environmental Regulation, 580 So. 2d 267 (Fla. 1st DCA 1991).

91. The Department’s evidence in this case does more than merely check the Petitioners' attempt to carry the burden of proving entitlement to the exemption. The Department’s evidence is overwhelming. The site of the proposed project had long been wetlands when the mosquito ditches were excavated in 1966-67.

And the site remains wetlands today without regard to the presence of the ditches. The site is historic wetlands.

92. Petitioners are not entitled to a mosquito ditch exemption from the permitting authority of the Department of Environmental Protection.

t. The ERP

i. Permit Required

93. A Department permit is required for any project where dredging or filling is to be conducted in state waters, as is the case here, unless exempted by statute or rule. Rule 62-312, Florida Administrative Code. Petitioners do not claim any exemption other than the mosquito ditch exemption.

ii. Burden of Proof

94. The applicant for the permit has the burden of proof in demonstrating it meets the statutory and rule criteria for obtaining the permit. Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644 (Fla. 3rd DCA 1992).

95. To obtain the permit, therefore, Petitioners must meet the criteria for activities in surface waters and wetlands found in Section 373.114, Florida Statutes, among others. To carry the burden of proof in meeting these criteria, Petitioners are not required to demonstrate any need or necessity for the permit. 1800 Atlantic Developers v. DER, 552 So. 2d 946 (Fla. 1st DCA 1989). Nor are they required to prove the absence of negative impacts from the project or demonstrate the creation of a net

environmental or societal benefit to meet the public interest test of Section 373.114, Florida Statutes. Id., at 957. But Petitioners do have the burden of providing the reasonable assurances that Section 373.114, Florida Statutes, requires, as well as certain rules of the Southwest Florida Water Management District adopted by the Department by reference.

iii. Applicability of SWFWMD Rules

96. The Department has adopted by reference Rule 40D-4.302, Florida Administrative Code, a rule promulgated by the Southwest Florida Water Management District (SWFWMD). The purpose of the adoption was for "application by the Department within the geographical jurisdiction of [SWFWMD]." Rule 62-330.200(3)(b), Florida Administrative Code. The McGinnis property is within the geographical jurisdiction of SWFWMD.

97. By paragraph (e) of the same rule quoted in Paragraph 89, above, the Department also adopted Chapter 3 of the document entitled "Basis of Review for Environmental Resource Permit Applications within the Southwest Florida Water Management District, 1995," subject to two amendments found in Rule 62-330.200(3)(e)1., and 2, Florida Administrative Code, which are not applicable in this case.

iv. Water Quality

98. Section 373.414(1)3, Florida Statutes, requires Petitioners to provide reasonable assurance that state water quality standards applicable to brackish, saline, tidal and

surface waters, including wetlands, will not be violated by issuance of the ERP.

99. Rule 40D-4.302(1)(c), Florida Administrative Code, provides that activities located in, adjacent to or in close proximity to Class II waters will comply with the additional criteria in subsection 3.2.5 of the Basis of Review, including submission of a plan or proposed procedure to protect the Class I waters and waters in the vicinity of the Class II waters.

100. Petitioners have failed to provide reasonable assurances that the applicable standards with regard to water quality will be met in this case. Petitioners have not provided a plan to protect the Class II waters of Miguel Bay or the waters in its vicinity.

v. Public Interest Tests

101. Section 373.414, Florida Statutes, also requires Petitioners to provide reasonable assurances that the activity proposed in, on or over the surface waters and wetlands in this case is not contrary to the public interest. With regard to the section of the proposed project, moreover, in waters designated as an Outstanding Florida Water, that is, within Miguel Bay and the Terra Ceia Aquatic Preserve, Section 373.414 requires that the petitioner meet a more stringent test. Petitioners must provide reasonable assurance that that part of the project "will be clearly in the public interest," Section 373.414(1), Florida Statutes.

102. In determining whether an activity meets these tests, the seven criteria of Section 373.414(a), Florida Statutes are to be considered and balanced.

103. The Petitioners have failed to provide the reasonable assurances that the public interest tests of Section 373.414, Florida Statutes, have been met. The project has not been proven to be not contrary to the public interest. And there was not even an attempt to prove that the project is "clearly in the public interest."

vi. Cumulative Impacts

104. Section 373.414(8), Florida Statutes, requires the Department to consider the cumulative impacts of the activity for which the permit is sought together with projects, among others, "which are existing or activities regulated under [Part IV of Chapter 373, Florida Statutes] which are under construction or projects for which permits or determinations pursuant to s. 373.421 or s. 403.914 have been sought."

105. The Petitioners did not provide the reasonable assurances required by Section 373.414(8), Florida Statutes.

vii. Mitigation

106. Section 373.414(1)(b), Florida Statutes, provides for the Department's consideration of measures proposed by or acceptable to the applicant to mitigate the adverse affects of the proposed activity if the applicant is unable to meet the criteria for issuance of the permit.

107. The proposed activity does not, however, meet the criteria for elimination or reduction of impacts contained in Section 373.414(1)(b), Florida Statutes and subsection 3.2.1 of the SWFWMD Basis of Review.

viii. Minimization

108. Construction of the residence in the uplands and abandonment of the boat basin and channel would reduce the impacts to the wetlands and the Outstanding Florida Waters of Miguel Bay to those caused by a dock in the bay with access from the residence by way of a boardwalk over the wetlands. Petitioners did not present any evidence that such an approach would be unreasonable or impractical. Other than to allude to Mr. McGinnis' status as a double above-the-knee amputee, there was no evidence that this status made a boardwalk an impractical method for him to gain access to the water. Perhaps a boardwalk could be specially equipped to facilitate his access. But, the issue remains obscured on the state of this record.

ix. Conclusion

109. It is easy to understand the frustration of Mr. and Mrs. McGinnis. They bought the property from the government. They inquired at the county office where they were told there were plans to provide additional services to the subdivision, plans which were followed up on by the County. There were no liens on the property and it was part of a platted subdivision, much of which has been developed already. The property, in the

words of their counsel's opening argument, has been ditched, diked, bermed and tilled. On this less-than-pristine site, they seek only to situate their residence so that most of the impact will fall on stunted mangroves that have suffered the misfortune of disruption during the decade of the sixties when mosquito control and coastal development were of primary concern.

110. But the frustration of Mr. and Mrs. McGinnis does not overcome the property's status as comprised primarily of historic wetlands. Nor does it diminish the value of the property's mangrove forest, including the stunted mangroves, a value inestimable both to wildlife and the ecological health of Miguel Bay. And finally, it cannot be overlooked that the bay is both classified as Class II, the highest classification for saline waters, meaning it is usable for shellfish propagation and harvesting, and designated an Outstanding Florida Water thereby deserving of special protection because of its natural attributes.

111. In the end, despite the hardship to Mr. and Mrs. McGinnis, the most reasonable course for this case is the one suggested by the Department: construction of the residence in the uplands with a dock in the bay, instead of a boat basin and channel, to which access may be gained by a boardwalk that has as little impact as possible on the wetlands and the invaluable mangroves growing over the bulk of the property.

RECOMMENDATION

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

That the Department of Environmental Regulation enter a final order denying both the mosquito ditch exemption and the Environmental Resource Permit applied for by Petitioners, Mel and Pamela McGinnis, for the project in DEP Permit File No. 412783533.

DONE AND ENTERED this 17th day of April, 1998, in Tallahassee, Leon County, Florida.

DAVID M. MALONEY
Administrative Law Judge
Division of Administrative Hearings
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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.