

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STANLEY and PATSY KENCNIK,)
)
 Petitioners,)
)
 vs.) Case No. 97-2481
)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 28, 1998, in Panama City, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Diane Cleavinger.

APPEARANCES

For Petitioner: Robert Tuno, Personal Representative
Real Estate Broker
Sunspot Realty
16428 Front Beach Road
Panama City Beach, Florida 32431

For Respondent: Ricardo Muratti, Esquire
Department of Environmental
Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue in this case is whether the application submitted by Stanley and Patsy Kencnik for an after-the fact coastal construction control line (CCCL) permit for an existing and expanded multi-level deck seaward of the CCCL in Panama City,

Florida, complies with the applicable provisions of Sections 161.053, Florida Statute, and Rule 62B-33, Florida Administrative Code, and should be granted.

PRELIMINARY STATEMENT

In April of 1996, the Department warned the Kenciks of potential violations for having an unpermitted deck that violated state regulation concerning CCCL. On July 9, 1996, the Kenciks applied to the Florida Department of Environmental Protection (DEP or Department) for an after-the-fact coastal construction control line (CCCL) permit, under Chapter 161 of the Florida Statutes and for a permit for the deck enhancement to the smaller previously permitted deck of their townhouse. On April 22, 1997, DEP issued a CCCL permit BA-469 ATF (BA-469) to the Kenciks. The permit provided for a single deck with stairs that was similar to the deck the Kenciks had prior to Hurricane Opal. DEP denied the after-the-fact permit for the new lower deck and deck addition. DEP required the Kenciks to remove the unpermitted deck they had built after Hurricane Opal.

The Kenciks filed a petition challenging BA-469 ATF as to the partial denial of their application. The matter was referred to Division of Administrative Hearings.

At the hearing, the parties stipulated to the exhibits that were entered into evidence. The Kenciks were not present at the hearing. Mr. Tuno, the Kenciks' realtor, was qualified by Judge Cleavinger to represent the Kenciks interests. Mr. Tuno did not present any witnesses or testimony but offered argument and

cross-examination. He also offered four photographs of the Kenciks' deck into evidence.

After the hearing, the Department filed its proposed recommended order on June 10, 1998. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. DEP has coastal permitting authority seaward of the coastal construction control line (CCCL) under Chapter 161, Florida Statutes and Rule 62B-33, Florida Administrative Code. The CCCL is a line of regulation established in each county that determines the area seaward of which all projects are subject to design regulation by the state due to their proximity to the ocean during a storm event. See Section 161.053, Florida Statutes.

2. The Kenciks townhouse is located at 17633 Front Beach Road, Panama City (the site) in Bay County, Florida. The townhome is seaward of the CCCL for Bay County. When the row of townhouses that the Kenciks live in was first constructed, the Department permitted the townhouses with decks.

3. The original deck along the seaward face of the Kenciks' townhouse consisted of a small triangular deck. The original deck pilings and deck of the townhouse did not extend seaward beyond any adjacent angled townhouse unit.

4. Moreover, the deck, not including the stairs, was built on the same foundation as the townhouse.

5. In 1995, Hurricane Opal destroyed the beach access stairs to the Kenciks' deck. However, the deck remained in

place, demonstrating the success of the deck design under extreme storm conditions.

6. In April of 1996, under the false assumption that it was okay to build the current deck because others were repairing or enhancing their destroyed decks after Hurricane Opal, the Kenciks added on a 10-foot square wooden lower deck and a 12-foot square attachment to the existing deck.

7. In the post-Opal chaos in Panama City Beach, many destroyed decks in the region were field permitted by DEP for reconstruction. Most field permits were for replacement of the decks that had been previously in place and permitted.

8. Field permits, issued by on-site DEP inspectors, are for small structures in the area landward of a frontal dune. A field permit would not have been applicable to the Kenciks' project which is seaward of a frontal dune. However, the Kenciks witnessed six decks being built which the Department had erroneously issued permits for. The six enhanced decks were close to the area of Petitioners' townhome. Two decks to the east of the Kenciks were enhanced in excess of ordinary criteria due to ambiguous permit specifications. Four decks to the west of the Kenciks should have been reviewed by the Tallahassee Bureau of Beaches and Coastal Systems office. However, they were reviewed and approved with less scrutiny at the field level and were permitted in error. Significantly none of the six decks would have been permitted based on each decks application had they undergone the appropriate permitting review. The Department

did not rescind these permits after the applicants relied on the agency action and proceeded to repair and enhance their decks.

9. At no time did the Department make any oral or written representation to the Kenciks that they could expand their deck or could build the current deck without a permit.

10. In April of 1996, the Department discovered the Kenciks' new unpermitted deck; DEP cited the Kenciks for having a deck not in conformance with Department regulations and for not having a permit to build it. In July of 1996, the Kenciks submitted an after-the-fact application for a CCCL permit for the deck structure.

11. An after-the-fact permit is a permit issued for work already done.

12. The new disputed deck substantially expanded the original structure. The new deck is comprised of a 12-foot by 14-foot upper deck addition to the original deck and a 10-foot by 10-foot lower deck with associated pilings and stairs. The lower deck functions as a turning point for the stairs of the deck. The Kenciks constructed a larger deck than their original deck, added a new lower deck, and ran stairs down through them. The new deck and pilings now extend out beyond all other decks in the row of townhouses and extend beyond the footprint and foundation of the Kenciks townhouse. No permit was applied for prior to the new decks' construction.

13. On April 22, 1997, the Department issued the Kenciks CCCL permit BA-469 ATF for the original small triangular deck with stairs that had been in place prior to Hurricane Opal. The

CCCL permit BA-469 ATF did not authorize the Kenciks to keep the unpermitted 12-foot by 14-foot addition or the 10-foot lower deck. The permit requires the removal of the addition and lower deck.

14. The evidence showed that the Kenciks' application to DEP did not contain sufficient information as to how the new deck was constructed, as to how it was attached to the townhome, or as to what the deck was made of. The application also did not detail how deep the deck pilings were, the deck's location relative to the mean high water line, and whether the deck is designed to reduce the potential for waterborne or airborne missiles during a storm event. Without such information, there was no evidence contained in the application to show that the deck project could withstand a storm event or whether the deck as built reduces the potential for waterborne or airborne missiles during a storm event.

15. Indeed the lower deck is at approximately + 12 NGVD (12 feet above ordinary sea level). The lower deck is in the same area as the stairs that were swept away by Opal formerly occupied. The lower deck is low enough to be interactive with a lesser storm event. Because a lesser storm event would impact the lower deck, it would be likely to fall apart, becoming waterborne missiles and adversely affecting adjacent properties. In a 20-year storm event (which occurs with less force than Opal), the lower deck will be destroyed, like the stairs were during Opal. The debris from that deck would likely hit the upper deck causing more waterborne or airborne debris.

16. In short, the evidence showed that the Kenciks' deck was not designed to minimize adverse impacts on adjacent properties, reduce the potential for generating aerodynamically propelled missiles or reduce the potential for generating hydrodynamically propelled missiles.

17. The unpermitted decks violate the permitting criteria applicable to structures of this type in the location of the Kenciks townhome adjacent to coastal waters. Therefore, the permit for the enhanced and expanded deck should be denied and the deck removed.

CONCLUSIONS OF LAW

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

19. If the location of a structure is proposed seaward of the CCCL, then the owner must obtain a CCCL permit from DEP by meeting the requirements of Section 161.053, Florida Statutes and Chapter 62B-33, Florida Administrative Code. Since the Kenciks' site is seaward of the CCCL for Bay County, DEP has jurisdiction over any construction at the site under its CCCL program. See Section 161.053, Florida Statutes and Rule 62B-33, Florida Administrative Code.

20. Part I of Chapter 161, Florida Statutes, is intended to "preserve and protect" Florida sand beaches and dunes adjacent to such beaches "from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger

adjacent properties, or interfere with public beach access." See Section 161.053(1)(a), Florida Statutes. The CCCLs were established "to define that portion of the beach-dune system which is subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions."

Id.

21. Rule 62B-33.055, Florida Administrative Code provides in pertinent part:

(3) After reviewing all information required pursuant to this Chapter, the Department shall:

(a) Deny any application for an activity which either individually or cumulatively would result in a significant adverse impact including potential cumulative effects. In assessing the cumulative effects of a proposed activity, the Department shall consider the short-term and long-term impacts and the direct and indirect impacts the activity would cause in combination with existing structures in the area and any other activities proposed within the same fixed cell. The impact assessment shall include the anticipated effects of the construction on the coastal system and marine turtles. Each application shall be evaluated on its own merits in making a permit decision, therefore, a decision by the Department to grant a permit shall not constitute a commitment to permit a additional similar construction within the same fixed coastal cell.

(b) Require siting and design criteria that minimize adverse impacts, and mitigation of adverse or other impacts.

* * *

(4) The Department shall issue a permit for construction which an applicant has shown to be clearly justified by demonstrating that all standards, guidelines and other requirements set forth in the applicable

provisions of Part I, Chapter 161, Florida Statutes, and this Chapter are met, including the following:

* * *

(e) The construction will minimize the potential for wind and waterborne missiles during a storm. . . .

22. Rule 62B-33.007, Florida Administrative Code, provides in pertinent part:

(4) Minor structures need not meet specific structural requirements for wind and wave forces, but they shall be designed to produce the minimum adverse impact on the beach and dune system and adjacent properties and to reduce the potential for generating aerodynamically or hydrodynamically-propelled missiles.

23. The Kenciks, as applicants, have the burden of proving that they are entitled to a CCCL permit. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). The Kenciks did not offer any testimony, expert witnesses, witnesses, documents, or competent substantial evidence during the hearing which demonstrated their entitlement to this permit.

24. In addition, the evidence showed that the Kenciks failed to minimize the potential for the upper deck addition and the lower deck to generate wind and waterborne missiles during a storm, in violation of Section 161.053(1)(a), Florida Statutes and Rules 62B-33.005(4)(e) and 62B-33.007(4), Florida Administrative Code, and failed to minimize the potential adverse impacts of the upper deck addition and the lower deck on adjacent properties and structures, in violation of Section 161.053(1)(a),

Florida Statutes and Rules 62B-33.005(3)(a)-(b) and 62B-33.007(4), Florida Administrative Code.

25. The only defense raised by Petitioner was estoppel based on the erroneously permitted decks built in the area of the Kenciks' townhome.

26. The doctrine of equitable estoppel may be applied against the state only rarely and under exceptional circumstances . . . , any decision regarding the application of equitable estoppel depends upon properly made findings of fact as to each of the three elements of estoppel: (1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." Dolphin Outdoor Advertising v. Department of Transportation, 582 So. 2d 709, 710-711 (Fla. 1st DCA 1991). See Cordes v. Department of Environmental Regulation, 582 So. 2d 652 (Fla. 1st DCA 1991) and Department of Environmental Regulation v. C.P. Developers, Inc., 512 So. 2d 258 (Fla. 1st DCA 1987).

27. The Department reviews every application on its own merits in making a permit decision; therefore, a decision by the Department to grant permits elsewhere on the coast does not constitute a commitment to permit additional similar construction within the same region. Rule 62B-33.005(3)(a), Florida Administrative Code.

28. The Kenciks have failed to show any departmental statement of material fact that would lead them to believe they

could enhance their deck. The Kenciks have failed to show they relied upon any statement, and cannot therefore show that reliance led to any detriment. Therefore, the Kenciks have failed to establish any basis that the Department should be estopped from applying Rule 62B-33, Florida Administrative Code, and Chapter 161, Florida Statutes, to their property. Rule 62B-33.005(3)(a), Florida Administrative Code, and Dolphin Outdoor Advertising, 582 So. 2d 710-711.

29. In this case, the Kenciks failed to offer any documentary evidence regarding the project for their proposed CCCL permit. Therefore, the application for the portion of the project requested by the Kenciks to which the Department objected should be denied.

RECOMMENDATION

Based upon the findings of fact and conclusions of law, it is,

RECOMMENDED:

That the Department of Environmental Protection permit BA-469 ATF be Affirmed and the Department of Environmental Protection enter a Final Order issuing the Department's permit BA-469 ATF of April 21, 1997, which denied in-part the application for a CCCL permit for the upper deck addition and the lower deck, and only approves the repair of the original deck and stairs, and requires removal of the unpermitted structures.

DONE AND ENTERED this 25th day of June, 1998, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of June, 1998.

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 should be filed with the agency that will issue the Final Order in this case.