

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THOMAS R. SWEENEY,)
)
 Petitioner,)
)
 vs.) Case No. 97-3116
)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 19, 1998, in Daytona Beach, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas H. Dale, Esquire
Post Office Box 14
Orlando, Florida 32802

For Respondent: Thomas I. Mayton, Jr., Esquire
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue is whether Petitioner's after-the-fact modification application for construction activities seaward of the coastal construction control line in New Smyrna Beach, Florida, should be approved.

PRELIMINARY STATEMENT

This matter began on April 24, 1997, when Respondent, Department of Environmental Protection, granted a request by Petitioner, Thomas R. Sweeney, for a modified, after-the-fact permit for certain construction activities seaward of the coastal construction control line on his property located at 5917 South Atlantic Drive, New Smyrna Beach, Florida. The letter granting the application provided, however, that the request to build a tiki hut and sundeck and to expand an existing open, wooden deck over an existing rock revetment had been denied. The letter further provided that the unapproved structures must be removed within sixty days after the issuance of the permit. Petitioner disagreed with these latter findings and requested a formal hearing to contest the proposed action.

The matter was referred by Petitioner to the Division of Administrative Hearings on July 9, 1997, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. By Notice of Hearing dated August 28, 1997, a final hearing was scheduled on November 19 and 20, 1997, in New Smyrna Beach, Florida. At the request of the parties, the hearing was continued to March 19, 1998, in Daytona Beach, Florida. On March 18, 1998, the case was transferred from Administrative Law Judge Don W. Davis to the undersigned.

At final hearing, Petitioner testified on his own behalf

and presented the testimony of Edward B. Robinson, the building contractor on the project. Respondent presented the testimony of Eugene D. Chaleki, administrator of the Bureau of Beaches and Coastal Systems and accepted as an expert in the areas of coastal and ocean engineering, beaches and shores systems, and coastal construction control line permitting; and Dana Latino, an engineer in the Bureau of Beaches and Coastal Systems and accepted as an expert in the area of coastal construction control line permitting. Also, it offered Respondent's Exhibits 1-9. All exhibits were received in evidence. Exhibits 1 and 2 are the depositions of Allen A. Davis and Robert Bullard, both professional engineers. The latter deposition was not filed until April 16, 1998.

There is no transcript of hearing. Proposed findings of fact and conclusions of law were filed by Respondent on April 23, 1998, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. In 1984, Petitioner, Thomas R. Sweeney, purchased a home at 5917 South Atlantic Drive, New Smyrna Beach, Florida. At that time, the home was approximately 3,000 square feet in size. The home sits seaward of the coastal construction control

line (CCCL) and thus any construction activities on the premises require the issuance of a CCCL permit from Respondent, Department of Environmental Protection (DEP).

2. In 1987, Petitioner constructed a first floor porch, second story addition, and wooden deck at the site without first applying for and obtaining a CCCL permit from the Department of Natural Resources, which was subsequently merged with DEP. After the construction was completed, Petitioner submitted an after-the-fact application for a CCCL permit for those structures. Before being issued Permit Number VO-423, Petitioner was required to pay an administrative fine.

3. Among other things, Permit VO-423 approved an already constructed wooden deck on the eastern side of the home which approximated 840 square feet in size. Petitioner was also given approval for a wooden walkway with stairs that provided access to the beach.

4. On June 1, 1995, Petitioner filed a second CCCL application with DEP to add a 20-foot first and second story addition with a deck to the south side of the home. After reviewing the application, on November 9, 1995, DEP issued CCCL Permit Number VO-627 authorizing the scope of work identified in the permit application documents.

5. Notwithstanding the limited amount of work authorized by the permit, Petitioner constructed a third story addition to

his home. He also removed the original wooden deck on the eastern side of the home, and he constructed spread footers and a foundation on top of the rock revetment for a new and much larger deck. The new deck is approximately 2,100 square feet, or more than 1,200 square feet larger than the original permitted deck. In its present state, the home is approximately 5,600 square feet, and the existing eastern deck is larger than any permitted deck on any other single-family home in Volusia County.

6. On September 9, 1996, DEP discovered the third story addition and the much larger wooden deck with appurtenant structures. Presumably at the behest of DEP, on November 22, 1996, Petitioner submitted an application for an after-the-fact modification of CCCL Permit Number VO-627 to authorize the previously completed, unauthorized work.

7. On April 23, 1997, DEP issued CCCL Permit Number VO-627 After-the-Fact. The permit approved the third-story addition to the home together with a 10-foot wide wooden deck on the seaward side of the entire third story and a 12-foot wide wooden deck on the landward side of the third story. DEP denied, however, authorization for Petitioner's new wooden deck on the first floor with a tiki hut and sundeck on the ground those structures violated Rule 62B-33.005(4)(e), Florida Administrative Code. That rule requires that any new construction seaward of the CCCL

"minimize the potential for wind and waterborne missiles during a storm." The issuance of the proposed agency action prompted Petitioner to initiate this proceeding.

8. On November 3, 1997, DEP entered a Final Order directing Petitioner to pay a fine because he illegally constructed structures seaward of the CCCL. The order was never appealed, and thus the time to challenge the order has elapsed. As of the date of hearing, Petitioner had not paid the fine, and a statutory lien has been placed on the property.

9. The Storm Surge Elevation at this site for a 100-year storm event is 10.7 feet N.G.V.D. The Breaking Wave Crest-Elevation for a 100-year storm event at this site is 14.9 feet N.G.V.D. Part of the new eastern deck is located below an elevation of 14.9 feet N.G.V.D.

10. The builder who constructed the additions, Edward Robinson, characterized them as "above average to superior" in quality. To minimize the possibility of the deck washing away during a storm event, he used the "best" nails, bolts, and concrete available. In addition, the new decking was rested upon concrete footers for support. The footers, however, are on top of a rock revetment, and Robinson conceded that such footers are not as stable as a pile foundation.

11. Petitioner used coquina rock (with a low unit weight) for his revetment. It was established that the rocks on which

the footers rest are not permanent, and they can shift during a large storm event. In fact, shifting can occur even during a ten-year storm, and there will be a total failure of the revetment during a thirty-year storm event. Once the stones move, an erosion process begins, and the deck will fail. The accompanying high winds will then lift the wooden debris in an airborne fashion. Depending on the strength of the storm, the airborne debris will be a threat not only to Petitioner, but also to his neighbors. Therefore, it is found that the existing construction for the eastern deck does not minimize the potential for wind and waterborne missiles during a storm, and it thus violates Rule 62B-33.005(4)(e), Florida Administrative Code, as alleged in the proposed agency action denying in part the permit.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

13. As the party filing an application, Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to a permit. See, e.g., Cordes v. State, Dep't of Envir. Reg., 582 So. 2d 652, 654 (Fla. 1st DCA 1991).

14. Section 161.053, Florida Statutes, governs coastal construction and excavation activities seaward of the CCCL.

Among other things, Subsection (1)(a) provides that

[s]pecial siting and design considerations shall be necessary seaward of established coastal construction control lines to ensure the protection of the beach-dune system, proposed or existing structures, and adjacent properties and the preservation of public beach access."

15. In addition, Rule 62B-33.005(4)(e), Florida Administrative Code, provides that DEP shall issue a permit for construction "which an applicant has shown to be clearly justified" by demonstrating that

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

In its proposed agency action, DEP relied on the foregoing rule in denying Petitioner's request for approval of an already constructed wooden deck with a tiki hut and sundeck on the rear of his home.

16. The more credible and persuasive evidence supports a conclusion that the eastern deck and appurtenant structures constructed by Petitioner violate the foregoing rule. This being so, the application for an after-the-fact amended CCCL permit must be denied as to those structures.

17. Finally, at hearing, Petitioner contended that "there is no statute, code, or regulation that prescribes and details acceptable or unacceptable construction," and because of this, "Respondent's statutory authority is unconstitutionally

overbroad and vague." Because the undersigned lacks authority to determine the constitutionality of a statute, it is unnecessary to address this contention. Key Haven Assoc. Enterprises, Inc. v. Bd. of Trustees of the Internal Improvement Fund, 427 So. 2d 153, 157 (Fla. 1982)("facial constitutionality of a statute may not be decided in an administrative proceeding").

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 denying Petitioner's application for an after-the-fact amended CCCL permit to construct an expanded eastern deck with a tiki hut and sun deck on his property at 5917 South Atlantic Avenue, New Smyrna Beach, Florida, and approving the application for the structures previously authorized by the Department in its Final Order issued on April 24, 1997.

DONE AND ENTERED this 11th day of May, 1998, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway

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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of May, 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 Department of Environmental Protection.