

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICIA MORELAND,)	
)	
Petitioner,)	
)	
and)	
)	
JAMES S. CAMPBELL and ROBERT)	
SWITZER,)	
)	
Intervenors,)	
)	
vs.)	Case No. 97-4943
)	
CITY OF GULF BREEZE and)	
DEPARTMENT OF ENVIRONMENTAL)	
PROTECTION,)	
)	
Respondents.)	
)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 15, 1998, in Pensacola, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Suzanne F. Hood.

APPEARANCES

For Petitioner: Patricia J. Moreland, pro se
86 Highpoint Drive
Gulf Breeze, Florida 32561

For Respondent City of Gulf Breeze:

Matt E. Dannheisser, Esquire
Matt E. Dannheiser, P.A.
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Pensacola, Florida 32501

For Respondent Department of Environmental Protection:

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

and

Thomas L. Mayton, Esquire
Department of Environmental Protection
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For Intervenors James S. Campbell and Robert Switzer:

Mary Jane Theis, Esquire
Beggs and Lane
Post Office Box 12950
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STATEMENT OF THE ISSUE

The issue is whether Respondent Department of Environmental Protection properly determined that Respondent City of Gulf Breeze was entitled to construct a concrete jetty at the mouth of Gilmore Bayou, to widen the mouth of the bayou an additional 35 feet, and to dredge sections of the bayou to a depth of minus eight feet.

PRELIMINARY STATEMENT

On or about July 28, 1997, Respondent Department of Environmental Protection (DEP) gave notice of its intent to issue Draft Permit No. 572874961 to Respondent City of Gulf Breeze (Gulf Breeze). Petitioner Patricia Moreland (Petitioner) filed

an Amended Petition to the State of Florida, Department of Environmental Protection to Deny Permit on September 30, 1997.

The undersigned issued a Notice of Hearing dated November 13, 1997. Said notice scheduled the hearing for January 15, 1998.

On December 24, 1997, Intervenor James S. Campbell and Robert Switzer (Intervenor) filed a Petition for Leave to Intervene. An order dated January 8, 1997, granted this petition.

At the final hearing, Gulf Breeze offered eight (8) exhibits which were admitted into evidence. DEP did not offer any exhibits. Intervenor did not offer any exhibits. Petitioner offered three (3) exhibits which were admitted into evidence.

The parties did not file a transcript of the proceedings. Gulf Breeze and DEP jointly submitted a Proposed Recommended Order on January 30, 1997. Petitioner did not file proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. On March 22, 1996, Gulf Breeze applied for a wetlands resource permit from DEP to allow the following: (a) dredging of the entrance channel to Gilmore Bayou in order to return the channel to its original width and depth; (b) construction of bulkheads on either side of the channel; and (c) construction of two jetties on the east side of the channel to slow the accretion of sediments in the channel.

2. The proposed project is located in the waters of the state at the southwestern end of Gilmore Bayou where it opens into Pensacola Bay.

3. The project is adjacent to and north of 406 Navy Cove Road, in the City of Gulf Breeze, Florida, Section 6, Township 35N, Range 29W.

4. The Petitioner's home is located at 86 Highpoint Drive, Gulf Breeze, Florida. Her residence is downstream from the project at the northeastern end of Gilmore Bayou.

5. The channel at the southwestern end of Gilmore Bayou was originally dredged in the mid-1950s. Since that time, the channel has provided a navigable outlet to Pensacola Bay for use by property and boat owners along Gilmore Bayou. The channel has also provided for water circulation and tidal flushing within the Bayou.

6. Maintenance dredging has been performed almost annually to keep the Gilmore Bayou channel open. The purpose of the proposed project is to reduce the need for the frequent maintenance dredging and to provide for better water circulation in the bayou.

7. A wetlands resource permit to perform maintenance dredging has not been required in the past because that activity was exempt from the permitting process.

8. On July 28, 1997, the Department issued Gulf Breeze a Notice of Intent to Issue Draft Permit Number 572874961 to

construct one seventy (70) foot long concrete jetty at the mouth of Gilmore Bayou, widen the mouth of Gilmore Bayou an additional thirty-five feet and dredge sections of the Bayou to a depth of minus eight feet. In issuing the Notice of Intent to Issue, the Department also considered Gulf Breeze's application for a five-year sovereign, submerged land easement for the location of the jetty.

9. Gulf Breeze published the Notice of Intent to Issue in a newspaper of general circulation in accordance with DEP requirements and Section 373.413(4), Florida Statutes, and Rule 62-343.090(2)(k), Florida Administrative Code. Thereafter, Petitioner filed a petition requesting that the permit be denied.

10. Petitioner has a substantial interest in the permitted activity, as she owns property and resides on Gilmore Bayou.

11. Petitioner's request that the permit be denied is primarily based on her opinion that water quality in Gilmore Bayou has deteriorated as a result of the original and continuous dredging of the channel at the southwestern end of Gilmore Bayou. She is concerned that the permitted activity will result in further water quality degradation and result in a further movement of the spit of land which extends in front of her home out to Deadman's Island on the northern side of the Bayou.

12. The ecosystem in Gilmore Bayou today is a healthy system which supports various marshes and fish. The ecosystem thrives despite water quality degradation resulting from

development and urbanization along its shores. More specifically, septic tanks, fertilizer runoff, and stormwater discharge have caused water quality to degrade in the Bayou. The most persuasive evidence indicates that the dredging of the channel over time has not caused the water quality to degrade.

13. The permitted activity will have a positive effect on water quality in Gilmore Bayou, as it will enhance tidal flushing through the channel.

14. The jetty, which is a part of the permitted activity, will slow the transport of sand into the channel, allowing for better flushing and reducing the need for maintenance dredging in the channel. Construction of the jetty is recommended and supported by the hydrographic study of Kenneth L. Echternacht, Ph.D., P.E. Gulf Breeze obtained and submitted this study to DEP to assist in evaluating the project.

15. The permitted activity will have no significant impact on the location of the spit of land extending from Petitioner's property to Deadman's Island. The shifting of the spit of land over the years has been caused by numerous factors which are identified in a 1993 study by Dr. James P. Morgan, Ph.D. These factors include development of the area, erosion of the surrounding bluffs, the location of the Pensacola Bay bridge, and storms and sand drift into channels to the east of the spit.

16. Without this project or frequent maintenance dredging, the channel at the southwestern end of Gilmore Bayou would fill

with silt. Eventually, the silt would inhibit water circulation and result in further water quality degradation in the bayou.

17. The permitted activity is not contrary to the public interest. Instead, it will benefit the public interest. The project will make it possible to maintain the Gilmore Bayou channel more efficiently. The project will allow for increased flushing of the bayou. The increased flushing will improve water quality in the bayou.

18. The permitted activity will not have any adverse effect on the conservation of fish or wildlife, or any endangered species or their habitats.

19. The permitted activity will not adversely affect navigation or flow of water or cause any harmful erosion or shoaling. It will have a positive effect on navigation and water flow and act to prevent harmful erosion or shoaling.

20. The permitted activity will have no adverse effect on fishing or recreational values or marine productivity in the vicinity of the project.

21. The permitted activity will provide for permanent jetties and bulkheads at the entrance to Gilmore Bayou.

22. The permitted activity will have no adverse effect on historical or archeological resources on Deadman's Island or in the vicinity of the project.

23. The permitted activity will have a positive impact on the recreational functions and use of the channel and Deadman's Island.

CONCLUSIONS OF LAW

24. 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.

25. Gulf Breeze, as the applicant for the permit, has the ultimate burden of proof in demonstrating entitlement to the permit sought. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 788 (Fla. 1st DCA 1981).

26. A DEP permit is required for this proposed project under Rule 62-343, Florida Administrative Code. This rule provides that a DEP permit must be obtained if dredging or filling is to be conducted in state waters, unless otherwise exempted by statute or rule.

27. The proposed project involves dredging and filling and placement of a jetty in waters of the state as defined in Rule 62-343.050, Florida Administrative Code.

28. Section 343.414, Florida Statutes, prohibits DEP from issuing a permit unless the applicant has provided reasonable assurance based on the plans, test results, or other information that the proposed project will not violate water quality standards.

29. The applicant has provided reasonable assurance that the proposed project will not cause water quality violations.

30. Section 373.414(1), Florida Statutes, prohibits DEP from issuing a permit for projects, in, on or over surface waters of the state unless the applicant has provided reasonable assurance that the project is not contrary to the public interest.

31. The applicant has provided reasonable assurance that the project is not contrary to the public interest.

32. A state grant of public easement to use sovereign submerged lands is required for this proposed project under Rule 18-21.004, Florida Administrative Code. This rule requires an applicant to obtain a state grant of a public easement to use sovereign submerged lands if an activity is to be conducted on sovereign submerged lands, unless otherwise exempted by statute or rule.

33. The proposed project (specifically the jetty) involves activity on sovereign submerged lands of the state as defined in Rule 18-21.003(50), Florida Administrative Code.

34. Rule 18-21.004(1), Florida Administrative Code, prohibits the state from granting a public easement to use sovereign submerged lands unless the applicant has provided reasonable assurance that the project is not contrary to the public interest.

35. The applicant has provided reasonable assurance that the proposed project is not contrary to the public interest.

36. Rule 18-21.004(2), Florida Administrative Code, prohibits the state from granting a public easement to use sovereign submerged lands unless the applicant has provided reasonable assurance that all sovereignty lands shall be considered single-use lands and shall be managed primarily for the maintenance of essentially natural conditions, propagation of

fish and wildlife, and traditional recreational uses such as fishing, boating and swimming.

37. The applicant has provided reasonable assurance that the project shall be considered single use lands and shall be managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating and swimming.

38. Rule 18-21.004(2), Florida Administrative Code, prohibits the state from granting a public easement to use sovereign submerged lands unless the applicant has provided reasonable assurance that the project will not result in significant adverse impacts to sovereignty lands and associated resources.

39. The applicant has provided reasonable assurance that the proposed project will not result in significant adverse impacts to sovereignty lands and associated resources.

RECOMMENDATION

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

RECOMMENDED:

That the Department of Environmental Protection issue a Final Order determining that its Notice of Intent to Issue Permit, together with Permit No. 572874961, is final agency action.

DONE AND ENTERED this 6th day of February, 1998, in
Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of February, 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.