

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COUNCIL OF CIVIC ASSOCIATIONS, INC.,)	
)	
Petitioner,)	
)	
vs.)	Case No. 98-0999
)	
KORESHAN UNITY FOUNDATION, INC., and DEPARTMENT OF ENVIRONMENTAL PROTECTION,)	
)	
Respondents.)	
)	
<hr/>)	
ESTERO CONSERVANCY, INC., and DOROTHY McNEILL,)	
)	
Petitioners,)	
)	
vs.)	Case No. 98-1000
)	
KORESHAN UNITY FOUNDATION, INC., and DEPARTMENT OF ENVIRONMENTAL PROTECTION,)	
)	
Respondents.)	
)	
<hr/>)	
ELLEN W. PETERSON,)	
)	
Petitioner,)	
)	
vs.)	Case No. 98-1001
)	
KORESHAN UNITY FOUNDATION, INC., and DEPARTMENT OF ENVIRONMENTAL PROTECTION,)	
)	
Respondents.)	
)	
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ENVIRONMENTAL AND PEACE)	
EDUCATION CENTER,)	
)	
Petitioner,)	
)	
vs.)	Case No. 98-1002
)	
KORESHAN UNITY FOUNDATION,)	
INC., and DEPARTMENT OF)	
ENVIRONMENTAL PROTECTION,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Fort Myers, Florida, on April 30 and May 1, 1998.

APPEARANCES

For Petitioner Council of Civic Associations, Inc.:

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STATEMENT OF THE ISSUE

The issue is whether Respondent Koreshan Unity Foundation, Inc., is entitled to a environmental resource permit for the construction of a wooden footbridge over the Estero River east of U.S. Route 41 and authorization to obtain by easement a right to use sovereign submerged lands.

PRELIMINARY STATEMENT

By application dated November 26, 1996, Respondent Koreshan Unity Foundation, Inc., requested an environmental resource permit and approval for the use of sovereign submerged lands. The purpose of the permit and approval was to allow Respondent Koreshan to construct a wooden footbridge over the Estero River to connect two parcels owned by Respondent Koreshan on opposite sides of the river.

By Consolidated Environmental Resource Permit and Sovereign Submerged Lands Authorization dated January 13, 1998, Respondent Department of Environmental Protection stated its intention to grant the permit and authorization.

Petitioners timely filed petitions challenging the tentative agency action and demanding a formal hearing. At the start of the hearing, Petitioner Council of Civic Associations, Inc., voluntarily dismissed its petition, so it is dropped from the consolidated cases. All references below to "Petitioners" exclude the Council of Civic Associations, Inc.

At the hearing, Petitioners called seven witnesses and offered into evidence 12 exhibits, exclusive of subparts. Respondent Koreshan Unity Foundation, Inc., called six witnesses and offered into evidence 16 exhibits. Respondent Department of Environmental Protection called one witness. Eleven members of the public also testified. All exhibits were admitted except Petitioner Exhibit 12.

The administrative law judge gave the parties 10 days after the filing of the transcript to file proposed recommended orders. The court reporter filed the transcript on May 28, 1998. Petitioner Peterson filed her proposed recommended order on June 8, 1998. This filing was timely because June 7 was a Sunday.

On June 11, 1998, Respondent Department of Environmental Protection filed a "Proposed Recommended Order," which actually was a request for an extension of time to June 12, 1998, within which to file its proposed recommended order. On June 12, 1998, Respondent Koreshan Unity Foundation, Inc., filed a "Notice of Adoption of Department of Environmental Protection's Proposed Recommended Order," which actually was an adoption of the Department's request for more time. This notice stated that Respondent Koreshan Unity Foundation, Inc., did not intend to file a separate proposed recommended order. On June 12, Petitioner Peterson filed a response in opposition to the request for more time, and Respondent Department of Environmental Protection filed a reply to the response. In the intervening six weeks between these filings and the preparation of this recommended order, neither Respondent has filed a proposed recommended order.

The motion for an extension of time to file a proposed recommended order is denied.

FINDINGS OF FACT

1. Respondent Koreshan Unity Foundation, Inc. (Koreshan) is a not-for-profit corporation dedicated to the preservation of the Koreshan heritage. Koreshan derives its heritage from a largely self-sufficient community that occupied land in south Lee County.

2. For several years, Koreshan has owned a parcel of 14.56 acres at the southeast corner of U.S. Route 41 and the Estero River. This parcel is bounded on the south by Corkscrew Road and contains an amphitheater and historical house, midway between the river and Corkscrew Road. The south end of this parcel contains a museum and parking area with access to Corkscrew Road.

3. The approximate dimensions of the 14.56-acre parcel are 544 feet along the river, 496 feet along Corkscrew Road, and about 1273 feet along the west and the east property lines.

4. The west property line is U.S. Route 41. The right-of-way for U.S. Route 41 is wider at the southern two-thirds of the parcel than the northern one-third of the parcel. A sidewalk runs on the east side of U.S. Route 41 from north of the river, across the U.S. Route 41 bridge, along the west boundary of Koreshan's property, at least to an entrance near the middle of the 14.56-acre parcel.

5. In October 1996, Koreshan acquired 8.5 acres of land at the northeast corner of the U.S. Route 41 and the river. The purpose of the acquisition was to provide parking for persons coming to Koreshan-sponsored events, such as music performances, at the 14.56-acre site. Koreshan rents a small portion of this northerly parcel to a canoe-rental business, which operates where the bridge and river meet.

6. To assist their visitors--some of whom are elderly and disabled--in gaining access to the 14.56-acre site, on November 26, 1996, Koreshan filed an application for a permit and authorization to construct a wooden footbridge across the Estero River about 315 feet east of the U.S. Route 41 bridge.

7. The source of the Estero River is to the east of the U.S. Route 41 bridge and the location of the proposed bridge. After passing under the U.S. Route 41 bridge, the river runs along the Koreshan state park, which is a short distance east of U.S. Route 41, before it empties into the Gulf of Mexico at Estero Bay, which is a state aquatic preserve. The portion of the river at the site of the proposed bridge is an Outstanding Florida Waterway (OFW) and a Class III water.

8. The river is popular with canoeists and kayakers. Persons may rent canoes and kayaks at the canoe rental business operating on the 8.5-acre parcel or the Koreshan state park. Although most canoeists and kayakers proceed downstream toward the bay, a significant number go upstream past the U.S. Route 41 bridge. Upstream of the bridge, the river narrows considerably.

9. Tidal currents reach upstream of the U.S. Route 41 bridge. At certain tides or in strong winds, navigating a canoe or kayak in this area of the river can be moderately difficult. Even experienced canoeists or kayakers may have trouble maintaining a steady course in this part of the river.

Less experienced canoeists or kayakers more often have trouble staying on course and avoiding other boats, the shore, vegetation extending from the water or shoreline, or even the relatively widely spaced supports of the U.S. Route 41 bridge pilings, which are about 30 feet apart.

10. Mean high water is at 1.11 feet National Geodetic Vertical Datum. The deck of the proposed footbridge would be 9 feet, 6 inches wide from rail to rail and 16 feet wide in total. The proposed footbridge would extend about 180 feet, spanning 84 feet of water from shore to shore. The bridge-ends would each be about 50 feet and would each slope at a rate of 1:12.

11. The proposed footbridge would rest on nine pilings: four in the uplands and five in the submerged bottom. The elevation of the bottom of the footbridge from the water surface, at mean high water, would be 8 feet, 8 inches. The distance between the centers of the pilings would be 14 feet, and each piling would be of a minimum diameter of 8 inches.

12. According to a special permit condition, the pilings would be treated with chromated copper arsenate, as a preservative, but they would be wrapped in impermeable plastic or PVC sleeves so as, in the words of the proposed permit, "to reduce the leaching of deleterious substances from the pilings." The proposed permit requires that the sleeves shall be installed from at least 6 inches below the level of the

substrate to at least 1 foot above the seasonal highwater line and shall be maintained over the life of the facility.

13. The proposed permit also requires that the footbridge be limited to pedestrian traffic only, except for wheelchairs. The permit requires the applicant to install concrete-filled steel posts adjacent to the bridge to prevent vehicles from using the bridge.

14. The proposed permit requires that Koreshan grant a conservation easement for the entire riverbank running along both shorelines of Koreshan's two parcels, except for the dock and boat ramp used by the canoe-rental business. The proposed permit also requires Koreshan to plant leather fern or other wetland species on three-foot centers along the river banks along both banks for a distance of 30 feet.

15. The proposed permit states that the project shall comply with all applicable water quality standards, including the antidegradation permitting requirements of Rule 62-4.242, Florida Administrative Code.

16. Respondents did not raise standing as an affirmative defense. It appears that Petitioners or, in the case of corporate Petitioners, members and officers all live in the area of the Estero River and use the river regularly.

17. For instance, Petitioner Dorothy McNeill resides one mile south of the proposed bridge on a canal leading to the Estero River, which she uses frequently. She is the president

and treasurer of Petitioner Estero Conservancy, whose mission is to preserve the Estero River in its natural state.

18. Petitioner Ellen W. Peterson resides on Corkscrew Road, 300-400 feet from the proposed footbridge. For 26 years, she has paddled the river several times weekly, usually upstream because it is prettier. She formerly canoed, but now kayaks.

19. The record is devoid of evidence of the water-quality criteria for the Estero River at the time of its designation as an OFW or 1995, which is the year prior to the subject application.

20. Koreshan has not provided reasonable assurance that the proposed footbridge would not adversely affect the water quality of the Estero River. Although the site of the proposed footbridge is devoid of bottom vegetation and there is no suggestion that this is anything but a natural condition for this part of the riverbottom, there is evidence that the proposed footbridge would adversely affect the water quality in two respects: turbidity caused by the pilings and leaching from the chromated copper arsenate applied to the pilings.

21. The turbidity is probably the greater threat to water quality because it would be a permanent factor commencing with the completion of the installation of the pilings. The leaching of the heavy metals forming the toxic preservative impregnated into the pilings is probable due to

two factors: damage to the PVC liner from collisions with inexperienced boaters and high-water conditions that exceed 1 foot over mean high water and, thus, the top of the liner. Both of these factors are exacerbated by flooding, which is addressed below.

22. Koreshan also has failed to provide reasonable assurance that the proposed footbridge is clearly in the public interest under the seven criteria.

23. The proposed footbridge would adversely affect the public health, safety, or welfare and the property of others through exacerbated flooding.

24. South Lee County experienced serious flooding in 1995. In response, Lee County and the South Florida Water Management District have attempted to improve the capacity of natural flowways, in part by clearing rivers of snags and other impediments to flow, including, in the case of the Imperial River, a bridge. One important experience learned from the 1995 floods was to eliminate, where possible, structures in the river, such as snags and pilings, that collect debris in floodwaters and thereby decrease the drainage capacity of the waterway when drainage capacity is most needed. Longer term, the South Florida Water Management District is considering means by which to redirect stormwater from the Imperial River drainage to the Estero River drainage.

25. The addition of five pilings (more as the river rose) would exacerbate flooding. On this basis alone, Koreshan has failed to provide reasonable assurance. Additionally, though, the HEC II model output offered by Koreshan does not consider flooding based on out-of-banks flows, but only on the basis of roadway flows. In other words, any assurances as to flooding in the design storm are assurances only that U.S. Route 41 will not be flooded, not that the lower surrounding land will not be flooded.

26. Koreshan failed to provide reasonable assurance that the proposed activity would not adversely affect the conservation of fish and wildlife, for the reasons already stated with respect to water quality.

27. Koreshan failed to provide reasonable assurance that the proposed activity would not adversely affect navigation or the flow of water. The flow of water is addressed above.

28. Navigation is best addressed together with the next criterion: whether the proposed activity would adversely affect fishing or recreational values or marine productivity in the vicinity of the activity.

29. Despite the presence of only two public launch sites, boating is popular on the Estero River. Reflective of the population growth of Collier County to the south and the area of Lee County to the north, the number of boaters on the Estero River has grown steadily over the years. The canoe-

rental business located on the 8.5-acre parcel rented canoes or kayaks to over 10,000 persons in 1996. Many other persons launched their canoes or kayaks for free from this site and the nearby state park.

30. Lee County businesses derive \$800,000,000 annually from tourism with ecotourism a growing component of this industry. The Estero River is an important feature of this industry, and the aquatic preserve at the mouth of the river and the state park just downstream from the proposed footbridge provide substantial protection to the scenic and environmental values that drive recreational interest in the river.

31. It is unnecessary to consider the aesthetic effect of a footbridge spanning one of the more attractive segments of the Estero River. The proposed footbridge and its five pilings effectively divide the river into six segments of no more than 14 feet each. This fact alone diminishes the recreational value of the river for the many canoeists and kayakers who cannot reliably navigate the U.S. Route 41 bridge pilings, which are more than twice as far apart.

32. As to the remaining criteria, the proposed footbridge would be permanent and the condition and relative value of functions being performed by areas affected by the proposed activity is high. There is conflicting evidence as to whether the proposed footbridge would adversely affect the

remnants of an historic dock, but it is unnecessary to resolve this conflict.

33. The mitigation proposed by Koreshan does not address the deficiencies inherent in the proposed activity.

CONCLUSIONS OF LAW

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

35. Rule 62-4.242(2)(a) provides:

No Department permit or water quality certification shall be issued for any proposed activity or discharge within an Outstanding Florida Waters, or which significantly degrades, either alone or in combination with other stationary installations, any Outstanding Florida Waters, unless the applicant affirmatively demonstrates that:

* * *

2. The proposed activity or discharge is clearly in the public interest; and . . .

* * *

b. The existing ambient water quality within Outstanding Florida Waters will not be lowered as a result of the proposed activity or discharge, except on a temporary basis during construction for a period not to exceed thirty days . . .

36. Rule 62-4.242(2)(c) defines "existing ambient water quality" as:

the better water quality of either (1) that which could reasonably be expected to have existed for the baseline year of an Outstanding Florida Water designation or (2) that which existed during the year prior to the date of a permit application.

37. As noted in the findings of fact, Koreshan has failed to meet the water-quality criteria applicable to an OFW.

38. Section 373.414(1) provides:

(1) As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of

others;

2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity. Such measures may include, but are not limited to, onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136. It shall be the responsibility of the applicant to choose the form of mitigation. The mitigation must offset the adverse effects caused by the regulated activity.

39. As noted in the findings of fact, Koreshan has failed to provide reasonable assurance that the proposed footbridge is clearly in the public interest, in light of the seven statutory criteria.

40. Rule 18-21.004(d) provides:

Activities on sovereign lands shall be limited to water dependent activities only unless the board determines that it is in the public interest to allow an exception as determined by a case by case evaluation. Public projects which are primarily intended to provide access to and use of the waterfront may be permitted to contain minor uses which are not water dependent if:

1. located in areas along seawalls or other nonnatural shorelines;
2. located outside of aquatic preserves or class II waters; and
3. the nonwater dependent uses are incidental to the basic purpose of the project, and constitute only minor nearshore encroachments of sovereign lands.

41. The proposed footbridge is not a water dependent activity. Koreshan has failed to show that it is in the public interest that it be authorized to use sovereign lands to construct the footbridge.

RECOMMENDATION

It is

RECOMMENDED that the Department of Environmental Protection enter a final order dismissing the petition of Petitioner Council of Civic Associations, Inc., and denying the application of Respondent Koreshan Unity Foundation, Inc.,

for an environmental resource permit and authorization to obtain an easement for the use of sovereign land.

DONE AND ENTERED this 3rd day of August, 1998, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.