

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTH FLORIDA WATER MANAGEMENT)
DISTRICT,)
)
Petitioner,)
)
vs.) Case No. 98-3053
)
JESUS G. QUEVEDO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 21, 1998, at West Palm Beach, Florida, before Errol H. Powell, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Scott Allen Glazier, Esquire
South Florida Water Management District
3301 Gun Club Road
West Palm Beach, Florida 33416

For Respondent: Larry M. Mesches, Esquire
Koepel, Gottlieb, Mesches,
Herzfeld & Rubin
222 Lakeview Avenue, Suite 260
West Palm Beach, Florida 33401-6146

STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner's revocation of Respondent's modified permit, authorizing a cross-fence on Petitioner's fee owned right-of-way, should be approved.

PRELIMINARY STATEMENT

On May 13, 1998, the South Florida Water Management District (District) served an Administrative Complaint and Order and Notice of Intent to Revoke Permit Modification upon Jesus G. Quevedo. On May 27, 1998, Mr. Quevedo, by and through his counsel, disputed the allegations of fact and requested a formal hearing. On July 15, 1998, this matter was referred to the Division of Administrative Hearings.

Prior to hearing, the parties filed a joint prehearing statement which contained, among other things, statutory and rule provisions, of which official recognition was requested to be taken, and stipulated facts. At hearing, official recognition was taken of the statutory and rule provisions.¹

At hearing,² the District presented the testimony of five witnesses and entered four exhibits into evidence (Petitioner's Exhibits numbered 1-4). Mr. Quevedo testified in his own behalf, presented the testimony three witness and entered eleven exhibits into evidence (Respondent's Exhibits numbered 1-3 and 5-12). One of Mr. Quevedo's exhibits was rejected (Respondent's Exhibit numbered 4) and portions of another exhibit were rejected (Respondent's Exhibit numbered 6(B), (C), (D), (E), (F), (G), (H), (I), (J), (S), and (T)).

A transcript of the hearing was ordered, which consisted of two volumes (Volumes I and II), and the time for filing of post-hearing submissions was set for December 15, 1998. Subsequently, the parties were granted an extension of time up to and including

January 4, 1999. The parties timely filed post-hearing submissions which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The South Florida Water Management District (District) is a public corporation in the State of Florida, existing by virtue of Chapter 25270, Laws of Florida (1949), and operating pursuant to Chapter 373, Florida Statutes, and Title 40E, Florida Administrative Code, as a multi-purpose water management district. The District's principal office is West Palm Beach, Florida.

2. In executing its multi-purpose, the District, as local sponsor for the US Army Corps of Engineers' Central and Southern Florida Flood Control Project, acquired canal rights-of-way. The District's rights-of-way were acquired to enable the Corps of Engineers to construct the flood control project and to maintain the system after its construction.

3. The District operates a proprietary-based right-of-way program to manage the various property interests of the canal rights-of-way. The purpose of the District's right-of-way program is, to the extent possible, to allow uses of the rights-of-way that do not conflict with the flood control project. The rights-of way are used by both public and private concerns, including adjacent property owners, governmental entities, and utility companies.

4. Jesus G. Quevedo is a private individual. His address is 2615 North Federal Highway, Lake Worth, Florida. The property

at this address was vacant when Mr. Quevedo purchased it, and he has owned the property for approximately ten (10) years.

5. The District has fee simple title to a strip of land on the south side of the District's C-51 Canal, immediately west of the Federal Highway/Olive Avenue bridge (C-51 Right-of-Way). Mr. Quevedo's property is located at the side of and adjacent to the C-51 Right-of-Way.

6. The C-51 Right-of-Way is also located within the boundaries of Spillway Park as established in the agreement between the District and the City of Lake Worth. Generally described, Spillway Park includes the District's fee simple owned right-of-way on the south side of the District's C-51 Canal, beginning at the west side of the Federal Highway/Olive Avenue bridge and continuing to the east side of the Dixie Highway bridge.

7. Mr. Quevedo has no real property interest in the C-51 Right-of-Way.

8. Prior to purchasing his property, Mr. Quevedo was aware that the District owned the C-51 Right-of-Way.

9. Historically, portions of Spillway Park and the C-51 Right-of-Way, in particular, have been a unique and popular location for excellent snook fishing by the public. These areas continue to be considered as such.

10. On February 11, 1993, Mr. Quevedo was issued SFWMD Permit No. 9801 (Permit), a right-of-way occupancy permit, by the

District's Governing Board. The Permit authorized him to make use of the District's lands and works as follows:

20' X 50' BOAT DOCK WITH WALKWAY, BURIED WATER AND ELECTRICAL SERVICE, POP-UP SPRINKLERS, AND SODDING WITHIN THE SOUTH RIGHT OF WAY OF C-51 LOCATED IMMEDIATELY WEST OF THE OLIVE AVENUE/FEDERAL HIGHWAY BRIDGE.

11. During the permit application process, but prior to the issuance of the Permit, Mr. Quevedo had discussed with the District's staff the erection of a cross-fence based on allegations of improper or criminal activities by members of the public. Subsequently, in November 1995, Mr. Quevedo again discussed with the District's staff erection of a cross-fence based on the same allegations but he also included a new allegation of public safety as to the C-51 seawall.

12. Based on the concern for public safety, the District's staff recommended that Mr. Quevedo be granted a modification to the Permit for a cross-fence. On November 14, 1996, the District's Governing Board approved, as part of its consent agenda, and issued SFWMD Permit MOD No. 9801 (MOD Permit)³ authorizing the following:

CHAIN LINK CROSS FENCE WITH 16' VEHICULAR GATE ALONG THE WEST PROPERTY LINE WITHIN THE SOUTH RIGHT OF WAY OF C-51 LOCATED AT 2615 NORTH FEDERAL HIGHWAY.

13. The MOD Permit, as did the Permit, provides in pertinent part on its face the following:

The permittee, by acceptance of this permit, hereby agrees that he shall promptly comply with all orders of the District and shall

alter, repair or remove his use solely at his expense in a timely fashion. . . .

This permit is issued by the District as a license to use or occupy District works or lands. . . . By acceptance of this permit, the permittee expressly acknowledges that the

permittee bears all risk of loss as a result of revocation of this permit.

14. The MOD Permit, as did the Permit, contained standard limiting conditions, as provided in Rule 40E-6.381, Florida Administrative Code, and special conditions. The limiting conditions provide in pertinent part as follows:

(2) Permittee agrees to abide by all of the terms and conditions of this permit, including any representations made on the permit application and related documents. . . .

(3) This permit does not create any vested rights, and except for governmental entities and public or private utilities, is revocable at will upon reasonable prior written notice. Permittee bears all risk of loss as to monies expended in furtherance of the permitted use. Upon revocation, the permittee shall promptly modify, relocate or remove the permitted use. In the event of failure to so comply within the specified time, the District may remove the permitted use and permittee shall be responsible for all removal costs.

(4) This permit does not convey any property rights nor any rights or privileges other than those specified herein. . . .

15. Having been granted the MOD Permit, Mr. Quevedo erected the cross-fence within and onto the C-51 Right-of-Way.

16. The C-51 Right-of-Way is located adjacent to Mr. Quevedo's property, as indicated earlier, and continues westerly to the permitted cross-fence. The C-51 Right-of-Way is enclosed by the cross-fence, preventing access by the public, and is located easterly of the cross-fence. As the C-51 Right-of-Way is located within the boundaries of the Spillway Park, the cross-

fence is also located within the boundaries of the Spillway Park.

17. During the time that Mr. Quevedo has owned his home, including prior to and after erection of the cross-fence, he, his family members and/or guests have frequently fished from the C-51 seawall and used the C-51 Right-of-Way enclosed by the cross-fence.

18. Prior to and after the erection of the cross-fence, Mr. Quevedo and his family members have selectively controlled access by the public to the C-51 Right-of-Way at the C-51 seawall.

19. Prior to the erection of the cross-fence, Mr. Quevedo chased members of the public off the C-51 Right-of-Way. Mr. Quevedo and members of his family also called law enforcement officers to remove members of the public who were located on the C-51 Right-of-Way, even if the members of the public were fishing from the C-51 seawall.

20. After the erection of the cross-fence, Mr. Quevedo and his family members continued to engage in this conduct of selective access.

21. Subsequent to the erection of the cross-fence, Mr. Quevedo had a member of the public arrested for trespassing. The person allegedly jumped over or went around the cross-fence to fish from the C-51 seawall in the C-51 Right-of-Way.

22. With the existence of the cross-fence, Mr. Quevedo has prevented the general public from using the C-51 Right-of-Way, including the C-51 seawall. As a result, he has acquired the

exclusive, private use of the C-51 Right-of-Way at the C-51 seawall, which is publicly owned land, and has, almost doubled the size of his adjacent property without the obligations and expense of acquisition, assuming he could acquire the property through acquisition.

23. The District's policy is that public land should be open to the public. Contrary to this policy, Mr. Quevedo's cross-fence precludes access to the District's right-of-way (C-51 Right-of-Way), including the seawall, for passive recreational use.

24. Similar cross-fencing, although not within the boundaries of Spillway Park, have been erected behind residences on the northeast, northwest, and southeast sides of Federal Highway, along the District's C-51 Canal bank. The cross-fencing prevents public use of the District's C-51 Canal bank at these locations.

25. The City of Lake Worth made improvements within the boundaries of Spillway Park; however, it made no improvements, and does not intend to make any improvements in the future, at the C-51 Right-of-Way where Mr. Quevedo's cross-fence is located or at the other private lots west of Mr. Quevedo's property. All of the improvements made at Mr. Quevedo's cross-fence at the C-51 Right-of-Way have been made by him even though the C-51 Right-of-Way is located within Spillway Park.

26. The original public safety rationale for authorizing

Mr. Quevedo to erect the cross-fence blocking public access was revisited by the District. Additional investigation by safety experts (Risk Management staff) revealed that no unreasonable

danger existed by allowing public access to the C-51 seawall at the C-51 Right-of-Way.

27. In the absence of the public safety basis for closure of the C-51 Right-of-Way, such closure was contrary to District policy. As a consequence, the District's staff recommended to the District's Governing Board that the MOD Permit, authorizing Mr. Quevedo's cross-fence, be revoked.

28. After conducting two public meetings and receiving comments from Mr. Quevedo, members of the public, and the District's staff as to the policy issue of public access to the C-51 Right-of-Way, the District's Governing Board determined that the C-51 Right-of-Way should be open to the public. Consequently, the Governing Board decided to revoke Mr. Quevedo's MOD Permit.

29. Allegations of criminal activity within the general boundaries of Spillway Park and, specifically, in the C-51 Right-of-Way at the cross-fence area, were made by Mr. Quevedo as a basis to not revoke the MOD Permit and allow the cross-fence to remain. Such allegations have no bearing on the revocation of the MOD Permit.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over this matter and the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

31. The District is authorized by Part I, Chapter 373,

Florida Statutes, to provide for District works in order to

accomplish the purposes and policies set forth in Chapter 373, Florida Statutes.

32. Section 373.016, Florida Statutes, provides in pertinent part:

(3) It is further declared to be the policy of the Legislature:

* * *

(i) To promote recreational development, protect public lands, and assist in maintaining the navigability of rivers and harbors;

33. Section 373.085, Florida Statutes, provides in pertinent part:

(1) The governing board has authority to prescribe the manner in which local works provided by other districts or by private persons will connect with and make use of the works or land of the district, to issue permits therefor, and to cancel the permits for noncompliance with the conditions thereof or for other cause. . . .

34. Section 373.086, Florida Statutes, provides in pertinent part:

(1) In order to carry out the works for the district, and for effectuating the purposes of this chapter, the governing board is authorized . . . to cross any highway or railway with works of the district and to hold, control, and acquire by donation, lease, or purchase, or to condemn any land, public or private, needed for rights-of-way or other purposes, and may remove any building or other obstruction necessary for the construction, maintenance, and operation of the works; and to hold and have full control over the works and rights-of-way of the district.

35. Rule 40E-6.011, Florida Administrative Code, provides in pertinent part:

(1) This chapter governs the use of or connection to works or lands of the District. Conditions and criteria are established to ensure that uses are compatible with the construction, operation, and maintenance of such works or lands.

(2) Due to the critical importance of works and lands of the District in providing flood protection and other benefits, it is considered essential that the District retain complete dominion and control over the use of such works and lands, including those subject to occupancy permits. The District acts in a proprietary capacity in acquiring lands or interests therein for utilization as works of the District. These rules are based upon proprietary concepts of property law. A "permit" to utilize works or lands of the District is a contract between the District and the "permittee," whereby the permittee obtains a license which is revocable at will, except as otherwise provided herein. All risk of loss regarding expenditures in furtherance of the permitted use is borne by the permittee. The District retains complete discretion as to the manner, if any, in which District works or lands may be utilized, and nothing in these rules is intended to limit that discretion.

* * *

(4) The terms "permit" or "occupancy permit" when used in these rules are intended to mean a contractual license to occupy the works or lands of the District.

36. Rule 40E-6.301, Florida Administrative Code, regarding the issuance of permits, provides in pertinent part:

(1) In determining whether an occupancy permit should be issued, the District shall consider whether the proposed activity:

* * *

(b) is consistent with the policy and objectives of Chapter 373, F.S., the legislative declaration of policy contained in Section 373.016, F.S. . . .

* * *

(j) interferes with actual or potential public use of the District's works or public recreational or other facilities not within the District's works

37. Standard limiting conditions, set forth in Rule 40E-6.381, Florida Administrative Code, are placed upon and included within all District right-of-way occupancy permits authorizing the use of District works and lands. Rule 40E-6.381, Florida Administrative Code, provides in pertinent part:

The District's authorization to utilize lands and other works constitutes a revocable license. In consideration for receipt of that license, permittees shall agree to be bound by the following standard limiting conditions, which shall be included within all permits issued pursuant to this chapter.

* * *

(3) This permit does not create any vested rights, and except for governmental entities and public or private utilities, is revocable at will upon reasonable prior written notice. Permittee bears all risk of loss as to monies expended in furtherance of the permitted use. Upon revocation, the permittee shall promptly modify, relocate or remove the permitted use. In the event of failure to so comply within the specified time, the District may remove the permitted use and permittee shall be responsible for all removal costs.

(4) This permit does not convey any property rights nor any rights or privileges other than those specified herein. . . .

38. As to the District's general rule for the revocation of permits, including right-of-way occupancy permits, Rule 40E-1.609, Florida Administrative Code, provides in pertinent part:

(2) The District may revoke a permit or modify its terms and conditions when it determines that such action is necessary to protect the public health, safety and welfare, prevent a public or private nuisance, or when the continued utilization of the permit becomes inconsistent with the objectives of the District. In such instances, due consideration shall be given to the extent to which the permittee has detrimentally relied upon the permit.

39. Moreover, Rule 40E-6.341, Florida Administrative Code, provides in pertinent part:

(1) [T]he District is authorized to revoke an occupancy permit under any of the following circumstances:

* * *

(d) the permitted use is inconsistent with the factors and conditions enumerated in section 40E-6.301, F.A.C.

40. The District demonstrated that the revocation of Mr. Quevedo's modified permit is warranted and that the conditions for revocation have been met. Mr. Quevedo's cross-fence prevents the promotion of recreational development and is, therefore, inconsistent with the legislative declaration of policy enunciated at Section 373.016, Florida Statutes. Furthermore, his cross-fence interferes with the actual and potential use of the public use of the District's works and is, therefore, inconsistent with Rule 40E-6.301, Florida Administrative Code.

The District demonstrated that Mr. Quevedo's present use and occupancy of the District's right-of-way (District's C-51 Right-of-Way) precludes all public access and use of the portion of the District's right-of way located within Spillway Park and adjacent to Mr. Quevedo's home; that that portion of the District's right-of-way has been historically and continues to be a unique and popular location for excellent snook fishing, which has been and should continue to be enjoyed by the public; and that Mr. Quevedo's preclusion of all public access and use of that portion of the District's right-of-way is contrary to the District's policy.

41. Moreover, the District demonstrated that, contrary to Mr. Quevedo's assertion of a safety risk by allowing public use, no unreasonable safety risk exists by allowing public access to that portion of the District's right-of-way.

42. As to detrimental reliance by Mr. Quevedo upon the permit, he was aware, before erecting the cross-fence and making any improvements on the permitted property and the C-51 Right-of-Way, that any such improvements would be at his own expense. Moreover, Mr. Quevedo's conduct shows that he considered the Permit and the MOD Permit not as a license granted by the District to use the District's right-of-way, but the granting to him of a proprietary right in the right-of-way, giving him additional private property, which allowed the use of the right-of-way, not by the general public, but by only those who he or

his family chose. The District has demonstrated that Mr. Quevedo's claim for damages, relating to expenditures by him, is unreasonable.

43. Mr. Quevedo has advanced an argument that addresses the invalid exercise of delegated legislative authority as to all or a portion of the District's rules governing the issuance of permits, the use of District property, and the revocation of permits for the use of District property. Mr. Quevedo cites Subsection 120.52(8), Florida Statutes, as the authority for this position. This instant proceeding is not a rule challenge and is, therefore, not a proper proceeding for challenging a rule or rules as invalid exercise of delegated legislative authority.

44. Even assuming that Mr. Quevedo's allegations of criminal activity within the general boundaries of Spillway Park and, specifically, in the C-51 Right-of-Way at the cross-fence area are considered pertinent to the revocation of the MOD Permit, the allegations are insufficient to support non-revocation of the MOD Permit.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the South Florida Water Management District enter a final order revoking SFWMD Permit No. MOD 981 issued to Jesus G. Quevedo.

DONE AND ENTERED this 8th day of March, 1999, in

Tallahassee, Leon County, Florida.

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of March, 1999.

ENDNOTES

^{1/} Mr. Quevedo requested official recognition to be taken of certain court documents regarding the case of Chase Manhattan Bank of Florida, N.A. v. South Florida Water Management District and the Game and Freshwater Fish Commission, Case No. 94-346-CA (Fla. 19th Cir. Ct. 1994). His request was denied.

^{2/} Mr. Quevedo alleged Florida Sunshine Law violations and made nuisance claims in his Petition. This Administrative Law Judge ruled at hearing that he lacked jurisdiction to decide Sunshine Law violations and to decided nuisance claims. However, as to nuisance claims, this ALJ ruled that testimony and evidence regarding nuisance would be allowed and considered to the extent that such testimony and evidence was considered by the District's Governing Board in making its revocation decision.

^{3/} When the approval of the cross-fence appeared on the Governing Board's agenda, the public safety reason was not mentioned in the agenda for the recommendation for approval. However, what appeared in the agenda were the unlawful or inappropriate activities by the members of the public.

COPIES FURNISHED:

Samuel E. Poole, III, Executive Director
South Florida Water Management District
3301 Gun Club Road
West Palm Beach, Florida 33416

Scott Allen Glazier, Esquire
South Florida Water Management District
3301 Gun Club Road
West Palm Beach, Florida 33416

Larry M. Mesches, Esquire
Koepel, Gottlieb, Mesches,
Herzfeld & Rubin
222 Lakeview Avenue, Suite 260
West Palm Beach, Florida 33401-6146

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.