

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN D. ROOD and JAMIE A. ROOD,)	
)	
Petitioners,)	
)	
vs.)	Case No. 98-3879
)	OGC No. 98-1743
LARRY HECHT and DEPARTMENT)	
OF ENVIRONMENTAL PROTECTION,)	
)	
Respondents.)	
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)	
KENNETH M. SEKINE, M.D.)	
and SHERYL A. SEKINE,)	
)	
Petitioners,)	
)	
vs.)	Case No. 98-3880
)	OGC No. 98-1789
LARRY HECHT and DEPARTMENT)	
OF ENVIRONMENTAL PROTECTION,)	
)	
Respondents.)	
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RECOMMENDED ORDER

Notice was provided and on December 15 and 16, 1998, a formal hearing was held in this case in the Screening Room, 7th Floor, Planning and Development Department, Florida Theatre Building, 128 East Forsyth Street, Jacksonville, Florida. The authority for conducting the hearing is set forth in Sections 120.569 and 120.57, Florida Statutes. The hearing was conducted by Charles C. Adams, Administrative Law Judge.

APPEARANCES

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STATEMENT OF THE ISSUE

Is the applicant, Larry Hecht (Hecht), entitled to issuance of an environmental resource permit and consent to use sovereign submerged land from the Department of Environmental Protection (DEP), allowing the construction of a dock?

PRELIMINARY STATEMENT

DEP noticed the intent to issue an environmental resource permit (the environmental permit) and consent to use sovereign submerged land (consent to use). Following the notice, by separate petitions, John D. Rood and Jamie A. Rood (the Roods), and Kenneth M. Sekine, M.D., and Sheryl A. Sekine (the Sekines), petitioned in opposition to the grant of the environmental permit and consent to use. Those cases before DEP were forwarded to the Division of Administrative Hearings with a request that an

administrative law judge be assigned to conduct a hearing to resolve disputes of material fact in accordance with Section 120.57(1), Florida Statutes. Following assignment, the cases were noticed for a consolidated hearing that was conducted on the aforementioned dates.

At hearing, the testimony of Larry Hecht; J. Ronald Henley; Lake G. Ray, Jr.; Kenneth Sekine, M.D.; Jeremy Tyler; Captain Donald Stratmann, Jr.; John D. Rood; and Roger Bennett was adduced. Rood Exhibits 1-7 were admitted, Hecht Exhibits 1-9 were admitted, and DEP Exhibits 1-4 and 6 and 7 were admitted. DEP Exhibit 5 was denied admission.

DEP filed a Motion in Limine to limit consideration of the establishment of the riparian rights line between the Rood and Hecht properties and Petitioners' overall riparian rights in recognition of the requirements set forth in Rule 18-21.004, Florida Administrative Code, and the limitations upon an executive branch agency in considering riparian rights. An order was entered on December 9, 1998, reminding the parties that an instruction would be given to the parties at the commencement of the final hearing concerning the application of the rule to the administrative proceeding, without deciding as a matter of law disputes over riparian boundaries and rights, matters which could only be resolved in a court of competent jurisdiction. Consistent with that order the limits on proof concerning riparian boundaries and rights was announced at the commencement

of the hearing as reported and transcribed. The ruling concerning the limits of consideration of the riparian boundaries and rights is found on pages 9, 34 through 40, 46 through 54, and 59 in the hearing transcript. These decisions were made in response to issues framed by the petitions addressing riparian boundaries and rights.

DEP had moved for official recognition of Chapters 120, 253, and 373, Florida Statutes, in part and recognition of Rules 18-21.004 and .005, Florida Administrative Code, together with the decision of Hageman v. Department of Environmental Protection and Carter, 17 F.A.L.R. 3684 (DEP 1995). Official recognition was given as announced at pages 74 through 76 of the hearing transcript.

Prior to hearing the Roods had moved for a view of the properties associated with this case. That motion was denied.

Fact stipulations by the parties announced on pages 71 through 73 and 345 through 353 in the hearing transcript were accepted.

A hearing transcript was filed on January 26, 1999. All parties timely submitted proposed recommended orders on February 16, 1999. Those submissions have been considered in the preparation of the recommended order.

FINDINGS OF FACT

The Parties

1. DEP in the interest of the Board of Trustees of the Internal Improvement Trust Fund is responsible for reviewing requests for the use of sovereign lands, to include sovereign submerged lands. In addition DEP is responsible for decisions involving applications for environmental permits. In considering Hecht's request for permission to construct a dock DEP is exercising the legal authority that has been described.

2. Hecht owns property at 2646 Beauclerc Road in Duval County, Florida, which fronts Plummers Cove, a part of the St. Johns River, a class III waterbody. Hecht has applied for the necessary permits and consent to construct and use a dock adjacent to his property. Hecht intends to use the dock for boating access and other forms of recreation.

3. The Sekines live at 2648 Beauclerc Road, immediately adjacent to the Hecht property. The Sekines property is in Duval County, Florida.

4. The Sekines have a preexisting dock which has been used for boating purposes and other forms of recreation.

5. The Roods live at 2635 Forest Circle, Duval County, Florida. Their property is immediately adjacent to the Hecht property on the opposite side from the Sekines. The Roods also have a dock granting access to boating activities and other forms of recreation.

6. The Sekines and the Rood properties are on Plummers Cove.

7. On May 18, 1998, DEP gave notice of its intent to issue necessary permits and consent for Hecht to construct a dock with conditions.

8. The Roods and Sekines opposed the grant of necessary permits and consent to use by filing petitions in opposition with DEP on June 4 and 9, 1998, respectively. Both sets of Petitioners had similar concerns in opposing the grant of permission to the extent that the Hecht application for permission to construct the dock allegedly interfered with Petitioners' riparian rights, would exceed the minimum length and size necessary to provide reasonable access to navigable water and would impede navigation.

The Application

9. In applying for the environmental permits and consent to use, Hecht relied upon a survey of the applicant's riparian rights lines performed by Harbor Engineering Company through Lake Ray, Jr., a civil engineer and land surveyor. Having in mind the results of that survey, the initial configuration and placement of the proposed dock has been modified because of problems in meeting the minimum set back requirement of 25 feet from the applicant's riparian rights line with the Roods, and in the absence of a sworn affidavit of no objection from the Roods, the affected adjacent upland riparian owner. The present alignment closely conforms to the setback requirement. The design and placement of the proposed dock in its original placement and

configuration, and as revised, was by J. Ronald Henley, of C & H Marine Construction, a dock builder.

10. John Rood has also had a riparian rights line survey performed which depicts the common line between the Rood's property and the property of Hecht. This survey was performed by Atlantic Gulf Surveying Co., Inc., a land and engineering survey firm.

11. The two riparian rights line surveys did not coincide when addressing the common riparian rights line between the Roods' property and that of Hecht.

12. Both the Harbor Engineering Survey and Atlantic Gulf Survey depict the Sekines' dock as crossing the riparian rights line between the Hecht and Sekines properties.

13. The DEP notice of intent to grant necessary permission was in relation to the revised application and coincides with the Harbor Engineering riparian rights line survey.

14. The proposed dock is 400 feet in length. It approaches the terminus of the existing Sekines' dock within 5 feet 10 inches. To maintain the proposed length and not violate the 25 foot setback line established according to the Harbor Engineering Survey, it must come that close to the Sekines' dock.

15. The proposed dock design has a boat slip and a slip for two small water craft, jet skis, within a boat house that totals 38 feet in length on the Sekines side of the proposed dock. There is an adjacent mooring with pilings spanning 40 feet next

to the location of the boat slips. The proposed dock extends another 43 feet beyond the boat facilities, to include an area that is 10 feet long and 20 feet wide at the terminus.

16. From the shoreline in the cove, the Hecht proposed dock is slightly longer than the existing Roods' dock.

17. The proposed dock and the Roods' dock extend roughly perpendicular from the shore. The Sekines' dock extends from the shore on a bias, bringing the existing Sekines' dock in close proximity with the proposed dock.

DEP Riparian Rights
Evaluation

18. DEP has a rule concerning riparian rights in the environmental context. That is Rule 18-21.004(3), Florida Administrative Code. In this case, where riparian rights between the Hechts, the Roods and the Sekines are unresolved, DEP has ultimately pursued a policy of permit review and consent to use on the basis that the two surveys are sufficiently comparable to allow the application to be examined for its substance, notwithstanding the dispute over the location of the riparian lines.

19. Beyond the review of the application, consistent with prior practices, DEP has imposed a condition upon the grant of its permission to address future disputes between the land owners over riparian rights lines. Under its traditional general consent conditions for use of sovereign submerged lands, at paragraph 12, DEP has imposed the following on the Hecht permit:

In the event that any part of the structure(s) consented to herein is determined by a final adjudication issued by a court of competent jurisdiction to encroach on or interfere with adjacent riparian rights, GRANTEE agrees to either obtain written consent for the offending structure from the affected riparian owner or to remove the interference or encroachment within 60 days from the adjudication. Failure to comply shall constitute a material breach of this consent and shall be grounds for its immediate termination.

20. Jeremy Anthony Tyler, Environmental Administrator for the Northeast District provided testimony concerning the policy position of his agency in relation to riparian rights, as well as, access to navigable water, and navigation.

Minimum Length and Size Necessary to
Provide Reasonable Access to Navigable Water

21. DEP Rule 18-21.005(1)(a)1, Florida Administrative Code, was used by DEP in considering whether to grant a consent of use of sovereign submerged land by affording Hecht reasonable access to navigable water, through the proposed dock, which DEP considers to be of the minimum length and size necessary to provide access.

22. Consistent with the rule, in determining the issue of consent of use, DEP expressed the position at hearing that the depth of water necessary to grant reasonable access is 4 to 5 feet mean low water, taking into account the alignment of the proposed dock that is consistent with docks in the area. In calculating access, the beginning point starts in deeper water and then moves toward the shore. A further consideration here

was the problem of conformance with riparian rights lines when identifying access to navigable water. The DEP policy in establishing reasonable access took into account the intention by Hecht to moor a boat of 40 plus feet in length, together with docking a boat of approximately 25 feet in length and two jet skis.

23. Additionally, consistent with past practices, DEP would normally approve consent of use for a single-family dock, such as the proposed dock, which conformed to a written non-rule policy of the DEP Northeast District related to minimum length and size criteria. In this instance the proposed application offends the policy in two respects. First, the proposal has more than two covered boat slips or two open moorings with adjacent mooring pilings or a combination of one each. Second, the proposed application has a mooring area and boat shelter that are 43 feet from the terminus of the proposed dock. Nonetheless, this policy on the minimum length and size criteria would allow the applicant to redesign the dock to meet the criteria that were not satisfactorily addressed. Thus far, no redesign had been proposed as an alternative.

24. At hearing DEP, through its witness, conceded that it had not considered the failure to comply with the number of boat slips or moorings allowed by the written policy when considering the application.

25. When C & H Marine Construction redesigned the boat dock in the interest of providing Hecht access to navigable water for his water craft, the dock builder also took into account the need for persons to access the terminus of the Sekines' dock, at least on one side of that terminus, without the boat traffic to and from the respective docks creating an unreasonable interference for use of the adjacent dock. The dock builder in designing the proposed dock intended to allow sufficient separation between the boating activities for the proposed dock and those at the terminus of the Sekines' dock. The Sekines have visitors to their dock who secure their boats at the terminus of the Sekines' dock. Nonetheless, the dock builder recognizes the close proximity between the terminus of the Sekines' dock and the proposed dock creates problems for the Sekines in the use of their dock. The engineer who performed the riparian rights line survey for the applicant recognized this same difficulty.

26. Literally, 4 feet of navigable water at mean low water can be reached at approximately the 182-foot mark on the proposed dock, with the five-foot depth mean low water at approximately 211 feet of the proposed dock, but these locations for gaining access present problems in relation to honoring the 25-foot setback on the side of the Hecht property near the Roods' property. The problems are in relation to the riparian rights line in that there would be insufficient room to install the proposed boat slips and mooring area and allow for maneuvering in

and out of the boat slips and mooring area without violating the set back line if those facilities were placed on the side of the dock adjacent to the Roods' property. Placement of those facilities on the other side of the dock at those distances at which the 4 foot and 5 foot depth mean low water would be obtained would not allow reasonable access when considering the 5'10" opening between the proposed dock and existing dock, in proximity of the Sekines' dock terminus. Therefore, the present dock design concerning placement of the slips and mooring is the better choice.

27. Captain Don Stratmann, Jr., Division of Law Enforcement, Florida Marine Patrol, which is part of the DEP, testified concerning access to navigable water by the applicant, by examining a nautical chart showing the 6-foot curved contour in the vicinity of the proposed dock, together with the length of the existing docks in the vicinity and some shallow soundings in the vicinity. He offered the opinion that the proposed dock was not unduly lengthy when considering reasonable access to navigable water, recognizing that the proposed dock is longer than docks immediately adjacent to it. Captain Stratmann had the opportunity to view the vicinity of the proposed dock in person. He had access to a quadrangle map supplied with the application in arriving at his opinion on reasonable access. In making his assessment of reasonable access to navigable water, he noted that

some portion of the length of the dock may be attributable to the contours on the shoreline which are uneven.

28. By contrast, Roger Bennett who is a former Florida Marine Patrol Officer and a Captain in command of the same district where Captain Stratmann now commands, expressed the opinion that the proposed dock exceeds the minimum length and size necessary to provide reasonable access to navigable water. He arrived at his opinion by checking the depths of water at the ends of docks in the vicinity of the proposed dock and observing the kinds of boats that were found at those docks, whether in a boat house or moored on pilings. The boat docks tended to be located in a well-defined line when compared to the shoreline, following the contour of the shoreline.

29. Neither of the opinions expressed by the present and former Marine Patrol commanders tended to address the special circumstances created by the close proximity of the riparian rights lines of the three property owners and the unusual placement of the Sekines' dock.

30. Mr. Ray expressed the opinion that the depth of mean low water for the minimum length for access should be 4 to 5 feet in elevation. Mr. Ray also expressed the opinion that the proposed dock would be longer than the Roods' dock because of the contour of the shoreline.

31. Mr. Henley expressed an opinion concerning the proximity of the pre-existing docks to the proposed dock as the

reason to extend the proposed dock. Part of his reasoning was in relation to placement of the proposed dock too close to the shoreline as not allowing boat operation while maintaining safety between the proposed dock and the Sekines' dock. He also had concern for interference with sea grass if placed too close to shore.

Adverse Affect on Navigation

32. In examining whether the proposed dock constituted an adverse affect upon navigation, Mr. Tyler spoke of the concept in terms of a hazard to navigation which he considered to be a dock sticking out into a marked channel or close to a marked channel, regularly used as a pathway for boats. He did not find that the proposed dock would extend into a marked channel in the main part of the St. Johns River. Moreover, he found that the proposed dock was fairly consistent with the configuration of existing docks in the area. Mr. Tyler did not express the opinion that problems of maneuvering water craft around docks was contemplated in describing the possible hazard to navigation. He considered maneuvering around docks to be a riparian rights issue.

33. Captain Stratmann in describing the DEP response to adverse effects on navigation deferred to 33 C.F.R. 245.20, in relation to the Corps of Engineers, Department of the Army, and 33 C.F.R. 64.31, in relation to the Coast Guard, Department of Transportation. Those references have not been incorporated by DEP into the Florida Administrative Code. Nonetheless, they form

the basis for Captain Stratmann to consider navigational issues in this instance and in similar past circumstances. He acknowledged that the references in the federal system are in relation to determination of hazards to navigation and do not specifically address adverse affects on navigation contemplated by Section 374.414(1)(a), Florida Statutes, a lesser problem. When taking into account the implications of the proposed dock Captain Stratmann did not feel that any of the criteria that he employs in relation to Title 33 C.F.R. had been violated. But his principal emphasis was in relation to navigation in the navigable channel in the river, similar to Mr. Tyler's opinion. As with Mr. Tyler, Captain Stratmann did not consider that boating activities in Plummers Cove constitute that form of navigation.

34. John Rood pointed out that boating takes place in Plummers Cove in and around the docks, specifically by persons water skiing in the Cove, which is calmer than would be the experience in the river channel away from the Cove. He and other witnesses acknowledged a sandbar near his dock that influences boat operations.

35. Mr. Bennett in describing his opinion concerning the affect on navigation promoted by the proposed dock, noted that the proposed dock sticks out further in the river than the dock owned by the Roods, thereby forming an unacceptable hazard to navigation. Given the frequency of traffic in and out of docks

in the vicinity of the proposed project, Mr. Bennett considers this traffic to form a potential navigational problem, to include the proximity of the Hecht proposed dock and the Sekines' existing dock.

36. Mr. Ray does not consider that the proposed dock forms a navigational safety hazard, especially when considering the length of the proposed dock.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

38. Here, the applicant has sought an environmental resource permit under authority set forth in Part IV of Chapter 373, Florida Statutes, and a consent of use of sovereign submerged lands in Class III waters, by constructing the proposed dock. Hecht must prove by a preponderance of the evidence, giving reasonable assurance, that the activities associated with the construction of the proposed dock on and over surface waters of the State is not contrary to the public interest. See Sections 120.57(1)(h), and 373.414(1), Florida Statutes.

39. Further, in determining whether the activity on and over the surface waters of the State is not contrary to the public interest, DEP shall consider whether the activity will adversely affect navigation, an issue promoted by the Petitioners in their opposition to the grant of the proposed permit. See

Section 373.414(1)(a)3, Florida Statutes. In consideration of the statute and DEP policy in furtherance of that section, which places emphasis on navigation in or near a navigable channel, DEP has not enlarged, modified, or contravened the statute. The DEP policy is not vague. The DEP policy establishes adequate standards for agency decisions. It does not vest unbridled discretion in the agency. The policy is not arbitrary or capricious. The policy has been applied to the substantially affected party, the applicant, with due notice. The policy is supported by competent and substantial evidence. It does not impose excessive regulatory costs on the regulated applicant. These determinations are made based upon the presentation of the policy concerning adverse affects on navigation and the challenge to that policy in the hearing de novo. See Section 120.57(1)(e), Florida Statutes.

40. In summary, Hecht has shown by a preponderance of the evidence, giving reasonable assurance, that the construction of the boat dock is not contrary to the public interest, when considering whether the activity will adversely affect navigation, consistent with the policy imposed by DEP to examine that issue.

41. In consideration of the intent to use sovereign submerged lands, DEP has promulgated Rule 18-21.004(3), Florida Administrative Code, describing riparian rights, wherein it is stated:

(a) None of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights of upland property owners adjacent to sovereignty lands.

(b) Applications for activities on sovereignty lands riparian to uplands can only be made by and approved for the upland riparian owner, their legally authorized agent, or persons with sufficient title interest in uplands for the intended purpose.

(c) All structures and other activities must be within the riparian rights area of the applicant and must be designed in a manner that will not restrict or otherwise infringe upon the riparian rights of adjacent upland riparian owners.

(d) All structures and other activities must be set back a minimum of 25 feet from the applicant's riparian rights line. Marginal docks may be set back only 10 feet. There shall be no exceptions to the setbacks unless the applicant's shoreline frontage is less than 65 feet or a sworn affidavit of no objection is obtained from the affected adjacent upland riparian owner, or the proposed structure is a subaqueous utility line.

In carrying forward this provision, DEP has indicated its intent on this occasion, given a knowledge of the competing surveys that have been mentioned in the facts, to proceed with the substantive assessment of the application, with the imposition of condition 12 in relation to the general consent for use of sovereign submerged lands. To the extent that this decision by the agency is seen as an extension of the provisions of law set forth in Rule 18-21.004(3), Florida Administrative Code, DEP has complied with the criteria that are set forth in Section 120.57(1)(e),

Florida Statutes, in demonstrating the acceptability of the unadopted rule. In this context, the applicant has shown compliance with both Rule 18-21.004(3), Florida Administrative Code, and the policy by a preponderance of the evidence.

42. In considering the question of the grant of the requested consent of use to use sovereign submerged lands over which the dock would be placed, reference is made to Rule 18-21.005(1)(a)1, Florida Administrative Code, to determine the question of approval. That provision states that Hecht would be entitled to:

A . . . single dock . . . which is no more than the minimum length and size necessary to provide reasonable access to navigable water.

This requirement is further explained by a preexisting policy described in the fact finding and the specific treatment of the issue of reasonable access to navigable water unique to the present case. In relation to those policies associated with the question of reasonable access to navigable water, DEP has demonstrated that the unadopted rule meets the criteria set forth in Section 120.57(1)(e), Florida Statutes. Moreover, to the extent that the policy under consideration is other than an unadopted rule, that is a policy designed specifically for this permit review, that unique policy does not violate preexisting law or unreasonably depart from preexisting policy. In this context Hecht has proven by a preponderance of evidence, that the proposed dock does not violate the minimum length and size

necessary to provide reasonable access to navigable water, with the exception that the proposed dock has too many boat slips or an unallowed mooring and the mooring area and boat shelter is located other than at the terminus of the proposed dock. For these reasons, the applicant must redesign the proposed dock by deleting the mooring or a boat slip and must place these features at the terminus of the proposed dock, which in this instance would cause the dock to be shortened by 43 feet before being allowed to proceed with the project.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered that grants the environmental resource permit and consent of use subject to the conditions contained in the intent to grant, and subject to a redesign deleting the mooring area or a boat slip and 43 feet of dock extending from the location of the mooring and boat slips.

DONE AND ENTERED this 10th day of March, 1999, in Tallahassee, Leon County, Florida.

CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 10th day of March, 1999.

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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.