

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDWARD SCOTT,)
)
 Petitioner,)
)
 vs.) Case No. 99-0294
)
 LARRY LEWIS and DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
 _____)
 SCOTT and VICKY PORTER,)
)
 Petitioners,)
)
 vs.) Case No. 99-0295
)
 LARRY LEWIS and DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
 _____)
 NICHOLAS DiBETTA,)
)
 Petitioner,)
)
 vs.) Case No. 99-0296
)
 LARRY LEWIS and DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
 _____)
 PAMELA and TOM WIDERMAN,)
)
 Petitioners,)
)
 vs.) Case No. 99-0297
)
 LARRY LEWIS and DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
 _____)

KATHY CRAWFORD and DOUGLAS)
 DEDO,)
)
 Petitioners,)
)
 vs.) Case No. 99-0298
)
 LARRY LEWIS and DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 13 and 14, 1999, at West Palm Beach, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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|---|---|
| For Petitioners: Scott, Porter, DiBetta, and Widerman | Glen J. Torcivia, Esquire 1800 Australian Avenue South Suite 205 West Palm Beach, Florida 33409 |
| For Petitioners: Crawford and Dedo | Andrew DeGraffenreidt, III, Esquire 1800 Australian Avenue South Suite 205 West Palm Beach, Florida 33409 |
| For Respondent: Lewis | John M. Jorgensen, Esquire 4400 PGA Boulevard, Suite 800 Palm Beach Gardens, Florida 33410 |
| For Respondent: Department of Environmental Protection | Ricardo Muratti, Esquire Department of Environmental Protection 3900 Commonwealth Boulevard Mail Station 35 Tallahassee, Florida 32399-3000 |

STATEMENT OF THE ISSUE

Whether the application of Respondent Lewis for an Environmental Resource Permit to construct a finger pier qualifies for an exemption from the need to obtain such a permit.

PRELIMINARY STATEMENT

In an application dated July 13, 1998, Larry Lewis applied to the Department of Environmental Protection ("Department") for a standard general permit to construct a three-foot-wide by thirty-six-foot-long finger pier on Cypress Creek in Palm Beach Gardens, Florida. In a letter dated August 21, 1998, the Department stated that it had reviewed the application with respect to regulatory authorization, proprietary authorization, and federal authorization. The Department of Environmental Protection notified Mr. Lewis in the letter that the Department had determined that his project was exempt from the requirement for an Environmental Resource Permit pursuant to Rule 40E-4.051(3)(b), Florida Administrative Code; that the project was to be built on sovereign submerged land and that the letter was authorization from the Board of Trustees of the Internal Improvement Trust Fund to construct the project; and that the permit application had been sent to the United States Army Corps of Engineers for a determination of whether the project required federal authorization.

Petitioners Edward Scott, Scott and Vicky Porter, Nicholas DiBetta, Pamela and Tom Widerman, and Kathy Crawford and Douglas

Dedo separately filed a petition for a formal hearing to contest the Department's decision, and the Department referred all five petitions to the Division of Administrative Hearings for assignment of an administrative law judge. The five petitions were consolidated by order entered February 9, 1999. Pursuant to notice, the final hearing was held on May 13 and 14, 1999.

At the hearing, Petitioners Edward Scott, Douglas Dedo, and Scott Porter testified on behalf of all of the Petitioners; Dedo Exhibits 1, 2, and 3 and Porter Exhibit 1 were offered and received into evidence. Respondent Larry Lewis testified in his own behalf and offered the testimony of Francine Vogell; Lewis Exhibits 1 and 2 were offered and received into evidence. The Department presented the testimony of Jayne Bergstrom, an Environmental Specialist II who processes environmental resource permit applications for the Department, and Department Exhibits 1 through 4 were offered and received into evidence. At the request of the Department, and without objection from Petitioners, official recognition was accorded Rules 40E-4.051, Florida Administrative Code, and Section 403.813, Florida Statutes. Finally, at the hearing, Mr. Lewis withdrew his pending Motion to Compel Discovery.

A transcript of the proceedings was filed with the Division of Administrative Hearings, and the Petitioners, the Department, and Mr. Lewis timely filed proposed findings of fact and conclusions of law, which have been duly considered.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department of Environmental Protection is responsible for administering the provisions of Chapter 373, and it is specifically responsible for issuing permits for the construction of docks in and over surface waters of the State of Florida. Sections 373.019(2); 373.026; and 373.413, Florida Statutes.

2. Mr. Lewis applied to the Department for an environmental resource permit to construct a finger pier extending into a waterway known as Cypress Creek, which is classified as Class III Waters and is located on the Intracoastal Waterway in Palm Beach Gardens, Florida. According to the plans submitted with the application, the finger pier will be three feet wide, will extend thirty-six feet from the bulkhead into Cypress Creek, and will extend approximately twelve feet past the mean low water line. The plans show that the pier will be built on pilings and will consist of 108 square feet of surface area. The finger pier will be used to dock one boat and will be used as a private dock.

3. When Mr. Lewis's application was initially reviewed, the Department assumed that Cypress Creek flowed over state-owned submerged lands. This assumption was reflected in the August 21, 1998, letter from the Department notifying Mr. Lewis that his

proposed finger pier qualified for an exemption from the requirement for an environmental resource permit pursuant to Rule 40E-4.051(3)(b), Florida Administrative Code. The Department subsequently learned that Cypress Creek is an artificially created waterway, and, therefore, the land beneath the creek is not state-owned submerged land.

4. Mr. and Mrs. Lewis own fee simple title to Lot 16 in Paradise Point, in Palm Beach Gardens, Florida. Petitioners Douglas Dedo and Kathy Crawford own Lot 17 in Paradise Point. Lot 16 is adjacent to Lot 17 but has no access to Cypress Creek.

5. Mr. Dedo's and Ms. Crawford's predecessor-in-interest in Lot 17 conveyed to Mr. Lewis's predecessor-in-interest an easement over the westernmost twelve feet of Lot 17, "for purposes of ingress and egress to Cypress Creek and for docking purposes." 1/

6. The property owned by Petitioners Scott and Vicky Porter is Lot 4 of Cypress Creek Point, which abuts the easement on the west side.

7. Mr. Dedo and Ms. Crawford have a marginal dock, that is, a dock which is roughly parallel to the shoreline, extending into Cypress Creek to the east of Mr. Lewis's easement. Mr. and Mrs. Porter have what is known as a "T-dock," extending into Cypress Creek to the west of Mr. Lewis's easement. The Porter's T-dock extends from the retaining wall eighteen feet into Cypress Creek.

Water Quality

8. The proposed finger pier will be constructed of wood, which will not adversely affect water quality. However, the proposed finger pier will be built on pilings, and the primary concern regarding the effect of this project on water quality is that the process of driving the pilings for the finger pier causes the sand to lift from the bottom of the waterway, causing turbidity, or cloudiness, in the water. The turbidity will be substantially mitigated for this project because the contractor will use turbidity screens to trap any sediment in the area where the pier is being constructed and around the pilings while they are being driven into the bottom of the creek bed.

9. In order to construct the finger pier, it will be necessary to drastically trim, and probably destroy, two or three young mangroves that are growing on the creek bottom in front of the retaining wall on the western edge of the easement. In addition, it will be necessary to lightly trim a few other young mangroves adjacent to the proposed pier, but these mangroves should not be destroyed. Although mangroves contribute to good water quality, the effect of the destruction of two or three young mangroves on water quality in Cypress Creek would be negligible.

Navigation

10. In the area in front of Lot 17, the lot owned by Mr. Dedo and Ms. Crawford and on which Mr. Lewis's easement is

located, Cypress Creek flows roughly east-and-west, with the entrance to the Intracoastal Waterway to the east of Lot 17. Just to the west of the easement, in front of Mr. and Mrs. Porter's property, the creek narrows and curves to the south. As a result of the narrowing of Cypress Creek in front of Mr. and Mrs. Porter's property, Mr. Lewis's proposed finger pier will not extend as far into Cypress Creek as the existing T-dock on the Porter's property. 2/

11. Most of the boats that pass the area where Mr. Lewis proposes to construct the finger pier are twenty-to-thirty feet long and have drafts from one-to-two feet.

12. At mid-tide on May 12, 1999, the water was four feet deep in the center of the channel in Cypress Creek, directly in front of Mr. Lewis's easement. The measurement from waterline-to-waterline in front of the easement was ninety-three feet. The measurement from waterline-to-waterline in front of Mr. and Mrs. Porter's property at mid-tide on May 12, 1999, was sixty-eight feet.

13. In navigating Cypress Creek, boaters curve toward the area where Mr. Lewis's pier will be located and, at low tide, "hug" the Porter's dock because of a shallow area which extends an undetermined distance into the creek from the north bank opposite the Porter's property. The water thirty-six feet from the bulkhead at the location of the proposed pier was four feet deep at low tide, as measured by Petitioner Dedo. At low tide,

again as measured by Petitioner Dedo, approximately twenty-two feet of Mr. Lewis's proposed pier would extend over dry land, with approximately fourteen feet of the pier extending over the water. At low tide on May 13, 1999, as measured by Petitioner Scott, Cypress Creek was sixty-four feet wide from waterline-to-waterline in front of the easement. Therefore, boaters would have approximately fifty feet of water in which to navigate past the proposed finger pier. 3/

Flood control

14. The proposed finger pier will not impede water flow through Cypress Creek and, therefore, will not adversely affect flood control. The pilings will be spaced twelve feet apart, and there will be no wave break or baffle or other impediment to water flow attached to the pier.

Summary

15. The evidence presented at hearing is sufficient to establish with the requisite degree of certainty that the three-foot by thirty-six-foot finger pier Mr. Lewis proposes to construct on the easement at the western edge of Lot 17 of Paradise Point will not violate water quality standards, impede navigation, or adversely affect flood control.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of

the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (1997).

17. As the applicant for a permit to construct a structure extending over waters of the State of Florida, Mr. Lewis has the burden of proving by a preponderance of the evidence that he has met the criteria for issuance of the permit or has met the criteria for exemption from the requirement of obtaining a permit. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932, 933-34 (Fla. 1996); see also Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

18. Section 373.413(1), Florida Statutes, provides as follows:

Except for the exemptions set forth herein, the governing board or the department may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district. The department or the governing board may delineate areas within the district wherein permits may be required.

"Works" are defined in Section 373.403(5), Florida Statutes, as "all artificial structures, including, but not limited to, ditches, canals, conduits, channels, culverts, pipes, and other

construction that connects to, draws water from, drains water into, or is placed in or across waters in the state."

19. The criteria which must be met in order for Mr. Lewis's proposed finger pier to be exempt from the requirement that he obtain an environmental resource permit are found in Section 403.813(2)(i), Florida Statutes, and Rule 40E-4.051(3)((c), Florida Administrative Code.

20. Section 403.813, Florida Statutes (1997), is concerned with projects in and over waters of the State of Florida that are limited in scope. The section sets forth exceptions to the requirement that permits be obtained and provides in pertinent part:

(2) No permit under this chapter, chapter 373, chapter 61-691, Laws of Florida, or chapter 25214 or chapter 25270, 1949, Laws of Florida, shall be required for activities associated with the following types of projects; however, nothing in this subsection relieves an applicant from any requirement to obtain permission to use or occupy lands owned by the Board of Trustees of the Internal Improvement Trust Fund or any water management district in its governmental or proprietary capacity or from complying with applicable local pollution control programs authorized under this chapter or other requirements of county and municipal governments:

* * *

(i) The construction of private docks and seawalls in artificially created waterways where such construction will not violate existing water quality standards, impede navigation, or affect flood control.

21. In Rule 62-330.200(4)(b), Florida Administrative Code, the Department has adopted the provisions of Chapter 40E-4, Florida Administrative Code, including Rule 40E-4.051, Florida Administrative Code, which provides in pertinent part:

Exemptions from permitting under Chapters 40E-4, 40E-40 and 40E-400, F.A.C., are set forth below. The performance of activities pursuant to the provisions of the exemptions set forth in this section does not relieve the person or persons who are using the exemption or who are constructing or otherwise implementing the activity from meeting the permitting or performance requirements of other District rules. Nothing in this section shall prohibit the Department from taking appropriate enforcement action pursuant to Chapter 403, F.S., to abate or prohibit any activity otherwise exempt from permitting pursuant to this section if the Department can demonstrate that the exempted activity has caused water pollution in violation of Chapter 403, F.S.

* * *

(3) Docking Facilities and Boat Ramps.

* * *

(c) Construction of private docks in artificially created waterways where construction will not violate water quality standards, impede navigation, or adversely affect flood control.

22. Based on the findings of fact herein, Mr. Lewis has satisfied his burden of proving by a preponderance of the evidence that the finger pier that is the subject of his application for an environmental resource permit qualifies for an exemption from the permit requirements pursuant to Section

403.813(2)(i), Florida Statutes, and Rule 40E4.051(3)(c), Florida Administrative Code. Mr. Lewis and the Department presented a prima facie case establishing that the proposed finger pier met the statutory and rule criteria for an exemption from the permit requirement, and the Petitioners failed to present persuasive evidence to rebut this prima facie case. 4/

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 finding that the finger pier Larry Lewis proposes to construct on Cypress Creek in Palm Beach Gardens, Florida, is exempt from the requirement that an environmental resource permit be obtained in order to construct such a structure in and over the waters of the State of Florida.

DONE AND ENTERED this 26th day of October, 1999, in Tallahassee, Leon County, Florida.

PATRICIA HART MALONO
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of October, 1999.

ENDNOTES

1/ On May 7, 1999, Judge Peter D. Blanc of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, entered a Final Summary Judgment concluding that Mr. Lewis has a valid easement over Lot 17 and that he has the right of ingress and egress to Cypress Creek and the right to construct a dock into Cypress Creek for docking purposes.

2/ See the drawing on Dedo's Exhibit 2.

3/ All of the depth measurements and waterline-to-waterline measurements presented as evidence at the hearing are problematic because they will vary throughout the year. The measurements are, however, accepted as approximations for purposes of resolving the issue presented herein.

4/ There was a great deal of speculation by the Petitioners who testified at the hearing regarding the length of the boat Mr. Lewis would dock at the proposed finger pier, the extent to which boats of various sizes would extend into Cypress Creek if they were to be docked at Mr. Lewis's proposed pier, and the extent to which a boat docked at Mr. Lewis's proposed pier would impede navigation of the creek. Although the permit application submitted by Mr. Lewis requested the "Proposed Size (length and draft), Type, and Number of Boats Expected to Use or Proposed to be Mooring [sic] at the facility," the length of the boat proposed or expected to be docked at the pier is not a factor to be considered in determining whether the proposed pier qualifies for an exemption from the requirement of an environmental resource permit.

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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.