

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRED AND JULIE BRAID,)
)
 Petitioners,)
)
 vs.) Case No. 99-0501
)
 JAMES AND CAROL ROSASCO, and)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated administrative law judge, Mary Clark, held a formal hearing in the above-styled case on May 19, 1999, in Viera, Florida.

APPEARANCES

For Petitioners: Fred Braid, pro se
4720 Highway A1A
Melbourne Beach, Florida 32951

For Respondents James and Carol Rosasco:

James Rosasco, pro se
4680 Highway A1A
Melbourne Beach, Florida 32951

For Respondent Department of Environmental Protection:

Thomas I. Mayton, Jr., Esquire
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue for disposition in this case is whether the Respondents, James and Carol Rosasco, qualify for a Noticed General Permit pursuant to Rule 62-341.427, Florida Administrative Code, and a Consent to Use pursuant to Rule 18-21.005, Florida Administrative Code, for a single-family dock, on the Indian River in Brevard County, Florida.

PRELIMINARY STATEMENT

On November 23, 1998, the Rosascos gave notice to the Department of Environmental Protection (DEP) of their intent to use a Notice General Permit (NGP) under Rule 62-341.427, Florida Administrative Code, and requested authorization from the Board of Trustees of the Internal Improvement Trust Fund (Trustees), through DEP, to use sovereign submerged lands pursuant to Rule 18-21.005, Florida Administrative Code, to remove an existing 200-foot dock and construct a 325-foot single family dock with a 10 by 16-foot terminal platform in the Indian River within an aquatic preserve.

On December 23, 1998, DEP provided a notice of general permit to the Rosascos stating that the project met the requirements for an NGP and the consent of use.

On January 20, 1999, adjoining property owners, Fred and Julie Braid timely filed their petition challenging the DEP's decision on the Rosasco project. The case was then transferred

to the Division of Administrative Hearings for conduct of an evidentiary hearing.

The Rosascos modified the proposed project on March 31, 1999, in an attempt to accommodate riparian rights concerns of the Braids. This revised proposal was the subject of the evidentiary hearing conducted as described above.

James Rosasco testified and presented eight Exhibits, marked and received in evidence as Rosasco Exhibits numbered 1-8. DEP presented the testimony of Brian Poole. Fred Braid testified and presented two Exhibits. Braid Exhibit numbered 1, a survey, was received in evidence over objection; Braid Exhibit numbered 2, agency "guidelines" was marked for identification only and was rejected.

The transcript was not prepared. The parties submitted Proposed Recommended Orders on May 28 and June 1, 1999. These have been considered with all the evidence of record in the preparation of this recommendation to the agency.

FINDINGS OF FACT

1. The Rosascos (James and Carol) own a parcel of real property on the Indian River at 4680 Highway AIA in Melbourne Beach, Brevard County, Florida (4680). The shoreline on the west of the Rosasco's property is more than 65 linear feet.

2. The parcel just south of the Rosasco's property is at 4690 Highway AIA (4690). It was recently owned by a subsidiary of Disney and was used as an executive retreat.

3. There is an existing dock at 4680, approximately 200 feet long, close to the upland boundary of 4680 and 4690, but extending southwest. The prior owner of 4680 and the Disney subsidiary had an agreement that allowed both to use and maintain the dock. The agreement was not renewed when the Rosascos purchased 4680. The Rosascos immediately made plans for a replacement dock and submitted the application that is the subject of this proceeding.

4. Fred and Julie Braid own the parcel just south of 4690, at 4720 Highway AIA (4720). They have an approximate 280-foot long dock which runs straight west from their shoreline.

5. In October 1998, Disney Realty, Inc., advertised 4690 for sale by bids. In December 1998, the Braids purchased the 4690 parcel with knowledge of ownership and configuration of the existing dock at 4680.

6. After DEP issued its intent to grant their Noticed General Permit and Consent of Use for the Rosasco's 325-foot replacement dock. The Braids challenged the decision in January 1999.

7. The Braids' two parcels and Rosasco's property are in a shallow cove area of the Indian River. Long docks are necessary there to provide boat access and to avoid seagrasses that are close to shore.

8. The Braids are primarily concerned that if the Rosascos are allowed to construct their replacement dock there will be no

room for the Braids to place a dock on their newly-acquired 4690 parcel.

9. The Braids' Petition for Administrative Hearing and challenge to DEP's intended action is in letter form and raises four basic concerns:

- a. the proximity of the proposed dock to 4690;
- b. whether the proposed dock would preclude the Braids' placing their own dock on 4690;
- c. possible damage to seagrasses; and
- d. problems with navigation.

10. In order to address the Braids' concerns, the Rosascos modified their application on March 31, 1999. The revised proposal increases the length of the dock from 325 feet to 500 feet and situates the dock to run north of the existing dock and parallel to that dock (which will be removed). The revised proposal has the new dock terminal starting 25 feet north of the property line and purported riparian line. The revised proposal would result in a minimum of 50 feet clearance between the new dock and the terminal platform of the Braids' existing dock at 4720.

11. The modification did not satisfy the Braids. At the hearing Mr. Braid used strips of paper on a drawing to show hypothetical converging of the proposed Rosasco dock and another long dock extending from the center line of his shore frontage at 4690 where Mr. Braid would like to build.

12. DEP staff have reviewed a signed and sealed survey submitted by the Rosascos which purports to show that both the original proposal and the revised dock proposal will place the new dock at least 25 feet from the riparian rights line between the Rosasco's property and the Braids' 4690 parcel.

13. The riparian line drawn on the Rosasco's survey is configured in the same manner as a riparian line reflected on a survey submitted by the Braids when they sought approval for their now-existing dock at 4720. That is, the surveyor simply extended the upland property line straight into the Indian River.

14. At hearing, the Braids submitted a survey of 4690 into evidence; this one angled the northern riparian line (line between 4690 and 4680) to run parallel to the southern riparian line (line between 4690 and 4720).

15. There are obviously various means of drawing riparian lines, and those lines are particularly complicated in a cove where the shore is curved. Without the testimony of any of the surveyors it is impossible to determine their respective bases for the conflicting depictions.

16. Neither the administrative law judge nor the DEP has any authority to determine riparian rights lines, as this a uniquely judicial function of a circuit court.

17. In reviewing applications for dock permits, DEP does not require a circuit court order determining a riparian rights line as that would be impractical and cost-prohibitive. Instead,

DEP accepts a signed, sealed, survey depicting a reasonable suggestion of the riparian rights line. This was the process when the Braids made application for their dock in 1996, and was the process when DEP reviewed the Rosasco's application in 1998.

18. The survey submitted by the Rosascos indicates that the dock proposal, and March 1999 revised dock proposal both situate the replacement dock at least 25 feet from the purported riparian rights line. DEP reasonably relied on that survey.

19. Brian Poole, a former DEP Environmental Specialist II with 25 years experience with the agency, reviewed the Rosascos' first and revised dock proposals. His lengthy experience includes processing and reviewing dock applications in this area of Brevard County and he is very familiar with seagrass habitat, dock placement, and navigation issues.

20. According to Brian Poole, and based on the surveys and aerial photographs, the Rosascos' revised proposal would not preclude the Braids' building a dock on their 4690 parcel. It could be configured, even zig-zagged, between the Braids' existing dock, and the Rosasco's proposed dock. The Rosasco's proposed dock would afford more room than the Rosasco's existing dock which is closer to the 4690 parcel.

21. Mr. Braid testified that some boaters in the Indian River travel close to the existing docks at 4680 and 4720 and that the longer dock proposed by the Rosascos will impede navigation.

22. The Indian River is approximately 8000 feet wide at the project site and the Intracoastal Waterway, which is the main navigational channel of the Indian River, is approximately one mile west of the project site. The proposed 500-foot dock will not come near the Intracoastal Waterway or other navigational channel.

23. There is already at least one other 500-foot dock in the vicinity of the Rosasco's and Braids' docks. There are several other shorter docks in the area. Because the water is shallow, any boaters close to the shore or using the existing docks will have to navigate carefully at idle speed and the docks will not impede their navigation.

24. At the hearing the Braids conceded that seagrasses were not an issue. This is confirmed by Brian Poole whose experience and knowledge of the area confirm that there are no seagrass beds or other submerged aquatic vegetation at the terminal platform or mooring area of the original proposed dock or the revised proposed dock. Seagrasses also do not appear in the aerial photographs beyond 300-feet from shore as poor light penetration inhibits their growth.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

26. DEP has regulatory jurisdiction over the Rosasco's proposed dock pursuant to Part IV of Chapter 373, Florida Statutes. DEP also has jurisdiction to authorize the use of certain state-owned sovereign submerged lands, including the submerged land at issue here, under Chapters 253 and 258, Florida Statutes.

27. The Rosascos, as applicants, have the burden of proving that they qualify for the NGP and consent of use. Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). The burden is one of "reasonable assurance" that certain regulatory requirements are met.

28. The general permit process differs from the regular permit application process.

Unlike other types of permits, general permits--including noticed general environmental resource permits--are not "issued." General permits are established by rule adoption and the rule, itself, is the general permit. A general permit rule authorizes persons to undertake an activity if: (a) the activity comes within the limiting parameters and applicable specific and general conditions of the rule establishing the general permit; (b) the person submits a notice of intent to conduct activities under the authorization of the general permit rule thirty days prior to conducting such activities; and (c) the Department does not inform the person within thirty days after receipt of a sufficiently complete notice that the activity does not come within the scope of the general permit rule and thus may not be conducted without a regular permit. See Fla. Admin. Code R. 62-341.201(1); Fla. Admin. Code R. 62-341-215(2); Fla. Admin. Code R. 62-343.090(1).

Castoro v. Palmer, DOAH No. 96-0736/95-5879, Final
Order DEP 10/15/98.

29. Rule 62-341.427, Florida Administrative Code,
establishes a general permit for certain piers and other
associated structures:

62-341.427 General Permit for Certain Piers
and Associated Structures.

(1) A general permit is hereby granted to
any person to construct, extend, or remove
piers and associated structures as described
below:

(a) single-family piers, along with boat
lifts, boat houses, terminal platforms, and
gazebos attached to the pier, where these
structures:

1. do not accommodate the mooring of more
than two water craft;
2. do not, together with existing
structures, exceed a total area of 2,000
square feet; and
3. have a minimum depth of two feet below
the mean low water level for tidal waters and
two feet below the mean annual low water
level for non-tidal waters for all areas
designed for boat mooring and navigational
access; and

(b) public fishing piers that do not exceed
a total area of 2,000 square feet provided
the structure is designed and built to
discourage boat mooring by elevating the
fishing pier to a minimum height of five feet
above mean high water or ordinary high water,
surrounding the pier with handrails, and
installing and maintaining signs that state
"No Boat Mooring Allowed."

(2) This general permit shall be subject to
the following specific conditions:

(a) construction or extension of the boat house, boat shelter, boat lift, gazebo, or terminal platforms, shall not occur over submerged grassbeds, coral communities or wetlands. In addition, the boat mooring location shall not be over submerged grassbeds, coral communities or wetlands. However, the access walkway portion of the pier may traverse these resources provided it is elevated a minimum of five feet above mean high water or ordinary high water, contains handrails that are maintained in such a manner as to prevent use of the access walkways for boat mooring or access, and does not exceed a width of six feet, or a width of four feet in Aquatic Preserves;

(b) there shall be no wet bars, or living quarters over wetlands or other surface waters or on the pier, and no structure authorized by this general permit shall be enclosed by walls or doors;

(c) the structure and its use shall not significantly impede navigability in the water body;

(d) there shall be no dredging or filling associated with construction of the structures authorized herein, other than that required for installation of the actual pilings for the pier, boat lift, boat shelter, gazebo, or terminal platform;

(e) there shall be no fish cleaning facilities, boat repair facilities or equipment, or fueling facilities on the structures authorized by this general permit. In addition, no overboard discharges of trash, human or animal waste, or fuel shall occur from any structures authorized by this general permit; and

(f) this general permit shall not authorize the construction of more than one pier per parcel of land or individual lot. For the purposes of this general permit, multi-family living complexes shall be treated as one parcel of property regardless of the legal

division of ownership or control of the associated property.

30. The Rosasco's proposed dock, as revised, must meet the conditions of Rule 62-341.427, Florida Administrative Code, and they have provided reasonable assurance that they do meet the two criteria at issue here: protection of grassbeds and no significant impediment to navigability.

31. Rule 18-21.005, Florida Administrative Code, describes the different types of proprietary authorizations (consent of use, lease, easement, use agreement, special event authorization, or other form of approval) that are required, based upon the size and scope of the proposed project. This rule, among other things, sets certain conditions under which an applicant is granted a consent of use by the Board of Trustees of the Internal Improvement Trust Fund. A consent of use allows the applicant to use sovereign submerged land without applying for a lease, easement, or other approval. An applicant may, as one option, rely upon a consent of use for "a single dock or access channel which is no more than the minimum size and length necessary to provide reasonable access to navigable water." Rule 18-21.005(1)(a)1, Florida Administrative Code. To obtain a consent of use under Rule 18-21.005, an applicant must meet, among other things, the requirements of Rule 18-21.004, Florida Administrative Code.

32. Riparian rights are addressed in Rule 18-21.004, Florida Administrative Code:

(3) Riparian Rights

(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.

33. The facts in this case establish that there is a dispute between the Rosascos and the Braids regarding whether the proposed dock meets the 25-foot set-back requirement. This dispute cannot be resolved in this proceeding. The local circuit court has exclusive original jurisdiction in all actions involving the title and boundaries of real property. Section 26.012(2)(g), Florida Statutes. The determination of rights of parties to a riparian boundary dispute is a matter subject to judicial, not

administrative, resolution. Buckley v. Dept. of Health and Rehabilitative Services, 516 So. 2d 1008, 1009 (Fla. 1st DCA 1987).

34. The DEP's practice of requiring only some reasonable surveyor's depiction of the property line is practical and within the agency's exercise of discretion. In this case the Rosascos did present a survey showing that their dock would comply with the setback requirement. The Braids' survey submitted to support a general permit for their dock established riparian lines in a manner similar to that used by the Rosasco's surveyor. A third survey submitted by the Braids at hearing presents a conflicting line between 4680 and 4690.

35. In at least two prior reported cases, DEP has addressed the absence of a clear showing of riparian rights by requiring the following standard conditions to the consent of use:

2. Grantee agrees that all title and interest to all lands lying below the historical mean high water line are vested in the board, and shall make no claim of title or interest in said lands by reason of the occupancy or use thereof.

* * *

5. Grantee agrees to indemnity, defend and hold harmless the Board and the state of Florida from all claims, actions, lawsuits and demands arising out of this consent.

* * *

12. 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 date of the adjudication. Failure to comply shall constitute a material breach of this consent and shall be grounds for its immediate termination.

Rood v. Hecht, DOAH Case No. 98-3879 (DEP Final Order entered 4/15/99); Hagerman v. DEP, DOAH Case Nos. 95-0158/95-0955 (DEP Final Order entered 8/21/95).

36. The Rosascos have provided reasonable assurance that their revised proposed dock and its use, with the addition of the above-quoted conditions 2, 5 and 12 to the consent of use, complies with Rule 18-21.004(3), Florida Administrative Code.

RECOMMENDATION

Based on all of the foregoing, it is hereby, RECOMMENDED:

A. The petition challenging the propriety of the general permit for Rosascos' related proposed dock and the related consent of use of sovereign submerged lands be DENIED.

B. The Rosascos' single-family dock project as revised in the March 31, 1999, modification be authorized pursuant to the applicable general permit rules, provided that the revised dock does not exceed a total area of 2,000 square feet, subject to design criteria limitations and other conditions.

C. The Rosascos's application for consent of use of sovereign submerged lands be GRANTED, subject to the general consent conditions quoted above and those imposed by rule.

DONE AND ENTERED this 1st day of July, 1999, in Tallahassee,
Leon County, Florida.

MARY CLARK
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 should be filed with the agency that will issue the final order in this case.