

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

J. HOWARD LOVETT, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 99-0689  
 )  
 DEPARTMENT OF ENVIRONMENTAL )  
 PROTECTION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Notice was provided and on June 7, 1999, a formal hearing was held in this case. The hearing location was the Washington County Courthouse, 1293 Jackson Avenue, Chipley, Florida. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes. The hearing was conducted by Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: J. Howard Lovett, pro se  
3131 Lovett Road  
Post Office Box 225  
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For Respondent: Ricardo Muratti  
Assistant General Counsel  
Department of Environmental  
Protection  
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3900 Commonwealth Boulevard  
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STATEMENT OF THE ISSUES

Is Petitioner entitled to an after-the-fact coastal construction control line (CCCL) permit for existing construction seaward of the CCCL in Gulf County, Florida? If not, should the existing construction be removed? See Section 161.053, Florida Statutes; and Chapter 62B-33, Florida Administrative Code.

PRELIMINARY STATEMENT

On December 21, 1998, a proposed final order was entered by Respondent denying Petitioner's request for an after-the-fact CCCL permit and requiring the removal of that construction. On January 19, 1999, Respondent received Petitioner's challenge to the proposed agency action. On February 16, 1999, the Division of Administrative Hearings received a request from Respondent to assign an Administrative Law Judge to conduct a hearing to resolve the dispute between the parties. The case was initially assigned to P. Michael Ruff, Administrative Law Judge. The hearing was conducted by the undersigned based upon the unavailability of Judge Ruff.

At hearing, Petitioner testified in his own behalf. Petitioner's Exhibits 1 through 7, 9, and 11-16, were admitted. Petitioner's Exhibit 10, was denied admission. Robert M. Brantly, Jr., P.E., testified for Respondent. Respondent's Exhibits 1 through 10, and 12 were admitted.

A hearing transcript was filed on June 23, 1999. Post-hearing, Petitioner submitted correspondence as argument with an

attachment. Respondent submitted a proposed recommended order. Subsequently, Respondent moved to strike portions of Petitioner's correspondence and the attachment from consideration. Specifically, Respondent has moved to strike portions of Petitioner's written argument with attachment as evidence not properly introduced at hearing. Petitioner's correspondence in reference to the attachment and the attachment itself have not been considered in preparing the recommended order. Nor has paragraph two in the correspondence been considered in preparing the recommended order. Those items described are stricken from consideration. Otherwise, the correspondence from Petitioner and the proposed recommended order by Respondent have been considered in preparing this recommended order.

#### FINDINGS OF FACT

1. Respondent exercises permitting authority for construction seaward of the CCCL under terms set forth in Chapter 161, Florida Statutes, and Chapter 62B-33, Florida Administrative Code. The CCCL is a regulatory line established in each coastal Florida county which demarks the landward extent of storm erosion for a major 100-year storm.

2. The CCCL has been established for Gulf County, Florida.

3. Petitioner owns property in Gulf County, Florida, at 2560 Indian Pass Road, Port St. Joe, Florida. The property includes a beach house and dock. The dock is seaward of the CCCL. The dock is subject to Respondent's permit requirements

under Chapter 161, Florida Statutes, and Chapter 62B-33, Florida Administrative Code.

4. Petitioner's property at that address is located on the eastern end of Indian Peninsula, adjacent to Indian Pass across from St. Vincent Island.

5. Petitioner's Gulf County address is not his permanent residence. Petitioner's permanent residence is in Washington County, Florida.

6. Petitioner seeks an after-the-fact permit for construction of a dock seaward of the CCCL.

7. Petitioner's dock contains six pilings. Three pilings are perpendicular to the shoreline. Three pilings are parallel to the shoreline. A narrow catwalk traverses the pilings. This forms an "L" shaped dock.

8. The two spans in the dock are approximately 25 feet in length each. The pilings that support the dock are approximately 16 inches in diameter. The width of the catwalk is approximately one and one-half feet. The catwalk is about one and one-half feet above mean high water.

9. The dock design allows for the planks in the catwalk to be removed in several minutes.

10. The CCCL bisects Petitioner's property in a manner that places the dock more than 200 feet seaward of the CCCL.

11. The area in the vicinity of the dock is subject to storm waves and storm tides from the open ocean, the Gulf of

Mexico. The area in question is not sheltered from the influences of the storm waves and storm tides.

12. The property here is also proximate to an inlet at Indian Pass. As such, the processes involved with tides, currents, and wave effects off of the shoals around the inlet have influence on the property. The processes are more dynamic than would be found on an open coast shoreline not adjacent to an inlet.

13. The dock is in the surf zone of the beach-dune system. That is the area where breaking waves occur. It is the most dynamic area in the coastal profile.

14. At one time there were seven pilings that had been installed by the Petitioner at the location. One piling has been dislodged and removed by events associated with waves and tides, possibly during a storm. If pilings were dislodged during a storm, a potential risk of damage to uplands through the creation of a wind or waterborne missile existed.

15. Storms which took place around the time that the piling was removed were Hurricanes Georges and Earl. Georges came ashore in Alabama near Perdido Key along the Alabama-Florida state line. It was a Category II storm when it made landfall, considered a severe storm. Earl came ashore near Mexico Beach close by the location of Petitioner's property. While Earl had been a strong storm, it decreased in strength, and at the time it made landfall was a minimal hurricane, a Category I. Earl and

Georges are considered routine hurricanes in comparison to a hurricane such as Opal, which came ashore in Pensacola, Florida, 100 miles away from Petitioner's property. Opal was a Category IV storm, stronger in its influence than Earl and Georges. Hurricanes of greater force than Earl and Georges can be more destructive to Petitioner's remaining dock than has been the case with the removal of the seventh piling. In the event of a Category V hurricane it is very likely that the present dock pilings would be dislodged.

16. To protect the catwalk against destruction from storm surge, it would need to be much higher in elevation from the mean sea level than is contemplated by its design. In the area of Petitioner's property, the mean high water line is approximately one and one-half feet above mean sea level. The decking in the dock would need to be constructed a minimum of 10 feet above mean sea level to avoid a storm surge from a twenty-year storm. The requirement for a 10-foot elevation is in relation to ocean or fishing piers. The dock in question is an ocean or fishing pier.

17. Storm surge associated with hurricane Georges, in the vicinity of Petitioner's property, was on the order of a ten-year storm. Hurricane Earl, in the vicinity of Petitioner's property, was in the nature of a ten to twenty-year storm event.

18. The Petitioner's pilings and the catwalk, if subjected to a ten or twenty-year storm event, would fail and become wind driven and waterborne missiles.

19. In the event that the structural members of the dock failed in a storm event and were generated as wind or waterborne missiles, they could damage the upland dwellings during the storm event.

20. The portability of the structural members of the catwalk does not relieve Petitioner of the obligation to design the overall structure in a manner to minimize the potential for generation of wind or waterborne debris. From Respondent's policy perception portability of the catwalk does not overcome the concern about the catwalk as part of the basic dock design and the risk that all features within the dock design are susceptible to becoming wind or waterborne in a storm event when considered as an entire structure.

21. Petitioner in his testimony indicated that his normal residence is about two hours from the dock location by automobile. Petitioner recognizes that in the event of an evacuation from the coastal area where his dock is found, in an anticipation of a storm, Petitioner might not have access to remove the catwalk.

22. Petitioner's dock is a major structure with potential to create an adverse impact to the coastal system, in particular upland structures if removed by the forces of nature. Petitioner's dock is not a typical ocean mooring, such as a floating buoy. The dock is not designed for expendability. It is designed to be permanent. By its permanency it presents the

risk of an adverse impact to the coastal system, to include upland properties.

23. The perpendicular pilings in the project are more shallow in their anchoring when compared to the parallel pilings. Both sets of pilings create concern that they will become wind or waterborne missiles. The parallel pilings are at the seaward limits of the structure. They are subject to being scoured and removed by a major storm event, no less so than the perpendicular pilings in their shallow placement. In addition to the scouring action at the base of the pilings, removing the material that forms the embedment for the pilings, wave action, and hydrodynamic forces exert an adverse influence on the pilings.

24. Unlike dune walkovers, the dock located in the surf zone is in the area where waves break and dissipate energy. That process typically transpires before the waves reach the dunes themselves where the dune walkovers are found. The dune area is less dynamic in this sense. In addition to dissipation of energy in the surf zone, energy from wave action is dissipated across the beach before reaching the upland location where the dune walkovers are found. It would take a more severe storm, which has a lesser probability of occurring, before a dune walkover would be at risk of deteriorating and becoming part of debris that poses a threat to upland structures.

25. The perpendicular piling nearest the beach presents an interference with lateral beach access.



26. Petitioner in presenting his application for an after-the-fact permit has not refuted Respondent's concerns about the potential for the pilings and deck to become displaced in a storm event placing the uplands at risk. Petitioner has not countered Respondent's proof presented through Robert M. Brantly, Jr., P.E. Mr. Brantly in his testimony offered the opinion that the structural members of the dock would be dislodged in a storm event and present a risk of becoming wind and waterborne missiles presenting the potential for destruction to upland property in the area. That opinion is accepted.

#### CONCLUSIONS OF LAW

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

28. Petitioner's dock is seaward of the CCCL. The CCCL is established to define that portion of the beach-dune system that is subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions. Section 161.053(1)(a), Florida Statutes. Unless Petitioner obtains a permit from Respondent the dock may not remain. Section 161.053(5) and (7), Florida Statutes.

29. The permit process is designed to be ". . . in the public interest to preserve and protect them from imprudent construction" which can ". . . provide inadequate protection to

upland structures, endanger adjacent properties, or interfere with public beach access." Section 161.053(1)(a), Florida Statutes.

30. In particular, Section 161.053(5)(a), Florida Statutes, concerning permitting states:

(5) Except in those areas where local zoning and building codes have been established pursuant to subsection (4), a permit to alter, excavate, or construct on property seaward of established coastal construction control lines may be granted by the department as follows:

(a) The department may authorize an excavation or erection of a structure at any coastal location as described in subsection (1) upon receipt of an application from a property and/or riparian owner and upon the consideration of facts and circumstances, including:

1. Adequate engineering data concerning shoreline stability and storm tides related to shoreline topography;
2. Design features of the proposed structures or activities; and
3. Potential impacts of the location of such structures or activities, including potential cumulative effects of any proposed structures or activities upon such beach-dune system, which, in the opinion of the department, clearly justify such a permit.

31. Additional requirements for permitting the dock are set forth in Rule 62B-33.005, Florida Administrative Code, which states:

(3) After reviewing all information required pursuant to this Chapter, the Department shall:

(a) Deny any application for an activity which either individually or cumulatively would result in a significant adverse impact including potential cumulative effects. . . .

(b) Require citing and design criteria that minimize adverse impacts, and mitigation of adverse or other impacts.

(4) The Department shall issue a permit for construction which an applicant has shown to be clearly justified by demonstrating that all standards, guidelines and other requirements set forth in the applicable provisions of Part I, Chapter 161, Florida Statutes, and this Chapter are met, including the following:

\* \* \*

(e) The construction will minimize the potential for wind and waterborne missiles during a storm.

32. Petitioner is not entitled to an after-the-fact permit. Petitioner has not given the necessary reasonable assurances concerning the design features of the dock as the construction would minimize the potential for wind and waterborne missiles during a storm and their adverse effect on upland structures, and endangerment to adjacent properties. To the contrary, Respondent, through its expert, established that the upland structures and adjacent properties to the dock are at risk by the structural members of the dock becoming wind and waterborne missiles during a storm event. Finally, Petitioner's dock presents a limited interference with public beach access.

33. Petitioner is not entitled to an exemption from permitting under terms set forth in Section 161.053, Florida Statutes, or Rule 62B-33.004, Florida Administrative Code.

34. Petitioner's dock is not subject to permitting under Section 161.041, Florida Statutes, in that it does not constitute the type activity contemplated by that permit process.

RECOMMENDATION

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

RECOMMENDED:

That a final order be entered which denies an after-the-fact permit for Petitioner's dock and calls for the removal of that dock upon a date established in the final order.

DONE AND ENTERED this 30th day of July, 1999, in Tallahassee, Leon County, Florida.

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CHARLES C. ADAMS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of July, 1999.

COPIES FURNISHED:

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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.