

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BAY OAKS CIRCLE ASSOCIATION, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 99-0851
)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondent.)
)
 and)
)
 RICHARD G. PERKINS,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER

On April 21, 1999, a formal administrative hearing in this case was held in Fort Myers, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Barry L. Dasher, pro se
Bay Oaks Circle Association, Inc.
3075 Bay Oaks Circle
Englewood, Florida 34223

For Respondent: Francine M. Ffolkes, Esquire
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

For Intervenor: Richard G. Perkins, pro se
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STATEMENT OF THE ISSUE

The issue in the case is whether the Petitioner should be granted an environmental resource permit and authorization to use sovereign submerged lands for construction of an extension to an existing multi-family residential docking facility.

PRELIMINARY STATEMENT

On June 4, 1997, the Petitioner filed an application for an environmental resource permit and for authorization to use sovereign submerged lands for construction of an extension to an existing multi-family residential docking facility. A number of requests for information were made after the filing of the application. The Respondent issued an undated Notice of Permit Denial apparently on or about October 28, 1998. The Petitioner filed a request for formal hearing on November 2, 1998. The request was forwarded to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner's representative testified on behalf of the association, and had one exhibit admitted into evidence. The Respondent presented the testimony of one witness and had exhibits numbered 1-6 admitted into evidence. The Intervenor testified on his own behalf.

A Transcript of the hearing was filed. The Respondent filed a Proposed Recommended Order.

FINDINGS OF FACT

1. The Petitioner, Bay Oaks Circle Association, Inc., represents the 20 property owners of the Bay Oaks Circle subdivision. Bay Oaks Circle borders on Lemon Bay.

2. Lemon Bay is a Class II Outstanding Florida Water. Lemon Bay is also an aquatic preserve and a designated state "Special Water."

3. The Lemon Bay aquatic preserve is recognized for its water quality and resources. To protect the resources, special standards are applicable to review of permits for aquatic activities.

4. The Petitioner's existing dock was permitted in the 1970's. The dock has four slips and extends approximately 100 to 120 feet from the shoreline into water depths of approximately one to one and a half feet at low tide. The dock attaches to the shoreline from a 45.5-foot wide easement owned by the Petitioner.

5. There is evidence of prop dredging in the existing mooring area. The existing mooring area has little natural value as a water resource.

6. Initially, the proposed dock was to extend another 120 feet (for a total extension of 220-240 feet) into deeper water approximately three to three and a half feet at low tide and would accommodate a mooring area for eight slips.

7. In the area of the proposed dock, most of Lemon Bay is about three and a half feet deep at low tide.

8. The application was subsequently amended to provide an extension of 112 feet for a total length of 199.5 feet, with six boat slips. The final proposal provided for a 104 feet long by three feet wide access walkway. Two 16 feet long by two feet wide "finger" piers would extend from the walkway. The end of the walkway would terminate in a dock platform 8 feet by 20 feet wide. The total square footage of proposed structure over water is 536 square feet.

9. The proposed mooring areas are defined by mooring pilings placed into the bay bottom. The applicant seeks a sovereign submerged land lease to permit the preemption of 2,219 square feet of submerged bottom land.

10. Because the proposed dock exceeds 500 square feet in an Outstanding Florida Water, a standard environmental resource permit must be obtained before the proposal can be constructed.

11. Two of the proposed mooring slips are over seagrasses. Additionally, two shallow areas located nearby contain seagrasses.

12. Seagrasses provide the basis of the food chain in the waters. Adverse impacts to seagrass beds negatively affect marine productivity, as well as the fishing and recreational values of the waters.

13. The proposed dock expansion poses a threat to the seagrass beds at the mooring slips and in the shallow areas near the shoreline and to the east of the proposed dock.

14. Although the proposed dock extension does not appear to directly impede a marked navigation channel, review of the bay bottom suggests that boats currently navigate in the proposed mooring area to avoid a shallower nearby shoal. It is likely that the proposed dock expansion would result in diversion of boat traffic into the seagrassed area of the shallower waters.

15. Section 373.414(1), Florida Statutes, sets forth the review criteria used in consideration of a permit application when the proposed activity occurs in an Outstanding Florida Water.

16. The Petitioner offered no evidence to establish that the permitting criteria set forth at Section 373.414(1), Florida Statutes, have been met.

17. The proposed multi-family docking facility requires issuance of a sovereign submerged land lease before the facility can be constructed.

18. Sovereign submerged land leases are reviewed according to the size of the proposed facility and the quality of the lands to be impacted by construction and operation.

19. Submerged land is classified according to resource quality into "Resource Protection Areas (RPA)" to permit appropriate application review. An RPA I is an area of fragile, easily-damaged marine resources such as coral beds or seagrasses, that require the highest level of protection. An RPA II is an area or seagrasses or benthic animals which, while not as fragile

as an RPA I, still require substantial protection. An RPA III is an area of sand that contains fewer marine resources than an RPA I or II.

20. The seagrassed areas near the proposed docking facility are classified as an RPA I.

21. The areas near the proposed docking facility contain less seagrass, but have substantial evidence of benthic animals, and are classified as RPA II.

22. According to the parties, the Petitioner must meet a "ten to one" rule to obtain a permit. In the alternative, the Petitioner may qualify for a lease if the proposed facility does not exceed the maximum square footage permitted for a single-family dock.

23. The ten-to-one criteria provides that the total dock structure may not preempt more than ten times the linear footage of the property owner's shoreline, in which case a lease may be issued.

24. In this case, the shoreline is 45.5 feet, resulting in a permissible preemption of 455 square feet. In this case the applicant proposes to preempt 2,219 square feet.

25. According to the credited testimony of the Respondent's witness, the single-family dock methodology does not qualify the proposed dock for permitting. Although a number of hypothetical dock proposals were discussed at the hearing, the hypothetical proposals are not included in the permit application. There is

no evidence that the agency gave any formal consideration to hypothetical proposals prior to the hearing.

26. At the hearing, the Petitioner proposed that the applicable rules be waived to allow the permit and lease to be issued. Specifically, the Petitioner proposed that the permitting criteria be waived as to dock design and minimum square footage.

27. There is no credible evidence to support waiver of applicable statutes and rules in this case.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. Section 120.57(1), Florida Statutes.

29. The Department of Environmental Protection is responsible for review and disposition of permit applications for the project at issue in this proceeding. Section 373.414(1)(a), Florida Statutes.

30. The Department of Environmental Protection has been delegated the authority to address applications under Chapters 253 and 258, Florida Statutes, for proprietary authorization for use of state-owned submerged lands under the authority of the Board of Trustees, when such applications also require the issuance of an environmental resource permit. Sections 253.77, 373.422, and 373.427, Florida Statutes.

31. The applicant has the burden of proving entitlement to the permit by a preponderance of the evidence. DOT v. J.W.C. Co. Inc., 396 So. 2d 778 (Fla. 1st DCA 1981.) In this case, the burden has not been met.

32. Section 373.414(1) Florida Statutes, sets forth the permitting standards by which this application must be considered, and provides as follows:

As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the activity will adversely affect the conservation of fish and

wildlife, including endangered or threatened species, or their habitats;

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

33. The evidence fails to establish that the proposed extension of the dock is clearly in the public interest.

34. Section 253.77(1), Florida Statutes, provides that any activity requiring use of sovereign state lands must receive the consent or proprietary authorization, such as a lease, from the state.

35. Section 18-20, Florida Administrative Code, sets forth the requirements to obtain a lease of sovereign submerged lands. Section 18-20.004(1)(b), Florida Administrative Code, states, "There shall be no further sale, lease or transfer of sovereignty lands except when such sale, lease or transfer is in the public interest."

36. Section 18-20.004(2), Florida Administrative Code, provides as follows:

(2) PUBLIC INTEREST ASSESSMENT CRITERIA:

In evaluating requests for the sale, lease or transfer of interest, a balancing test will be utilized to determine whether the social, economic and/or environmental benefits clearly exceed the costs.

(a) GENERAL BENEFIT/COST CRITERIA:

1. any benefits that are balanced against the costs of a particular project shall be related to the affected aquatic preserve;
2. in evaluating the benefits and costs of each request, specific consideration and weight shall be given to the quality and nature of the specific aquatic preserve. Projects in the less developed, more pristine aquatic preserves such as Apalachicola Bay shall be subject to a higher standard than the more developed preserves; and
3. for projects in aquatic preserves with adopted management plans, consistency with the management plan will be weighed heavily when determining whether the project is in the public interest.

(b) BENEFIT CATEGORIES:

1. public access (public boat ramps, boatslips, etc.);
2. provide boating and marina services (repair, pumpout, etc.);
3. improve and enhance public health, safety, welfare, and law enforcement;
4. improved public land management;
5. improve and enhance public navigation;
6. improve and enhance water quality;

7. enhancement/restoration of natural habitat and functions; and

8. improve/protect endangered/threatened/unique species.

(c) COSTS:

1. reduced/degraded water quality;

2. reduced/degraded natural habitat and function;

3. destruction, harm or harassment of endangered or threatened species and habitat;

4. preemption of public use;

5. increasing navigational hazards and congestion;

6. reduced/degraded aesthetics; and

7. adverse cumulative impacts.

(d) EXAMPLES OF SPECIFIC BENEFITS:

1. donation of land, conservation easements, restrictive covenants or other title interests in or contiguous to the aquatic preserve which will protect or enhance the aquatic preserve;

2. providing access or facilities for public land management activities;

3. providing public access easements and/or facilities, such as beach access, boat ramps, etc.;

4. restoration/enhancement of altered habitat or natural functions, such as conversion of vertical bulkheads to riprap and/or vegetation for shoreline stabilization or re-establishment of shoreline or submerged vegetation;

5. improving fishery habitat through the establishment of artificial reefs or other such projects, where appropriate;

6. providing sewage pumpout facilities where normally not required, in particular, facilities open to the general public;

7. improvements to water quality such as removal of toxic sediments, increased flushing and circulation, etc.;

8. providing upland dry storage as an alternative to wet slip; and

9. marking navigation channels to avoid disruption of shallow water habitats.

37. The evidence fails to establish that the proposed dock extension at issue in this proceeding meets the criteria for issuance of a land lease.

38. The Petitioner produced no credible evidence in support of the application to extend the dock. The Petitioner's sole witness acted as the Association's representative. He wrote a statement essentially expressing his opinion of the application process and read the statement at the hearing. The only exhibit offered by the applicant was a copy of his statement. The Petitioner offered no evidence relevant to the issue of whether the proposed project meets the applicable permitting criteria. The Petitioner offered no evidence that would support the assertion that the permitting criteria should be waived in this case.

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 denying the application for the proposed dock extension filed by the Bay Oaks Circle Association, Inc.

DONE AND ENTERED this 16th day of July, 1999, in Tallahassee, Leon County, Florida.

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 16th 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 must be filed with the agency that will issue the Final Order in this case.