STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VINCENT R. D'ANTONI, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 99-1916
	)	99-2861
DEPARTMENT OF ENVIRONMENTAL PROTECTION and DAVID BOSTON,	)	
	)	
Respondents.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in these cases on September 28, 1999, and January 27, 2000, in Jacksonville, Florida, and by telephone on February 21, 2000, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Vincent R. D'Antoni, Jr., pro se
3824 Wayland Street
Jacksonville, Florida 32277

For Respondent: (agency) Francine M. Ffolkes, Esquire
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For Respondent: (Boston) David Boston, pro se
2262 Orchard Street
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STATEMENT OF THE ISSUES

The issues are whether David Boston should be issued an environmental resource permit and sovereign submerged lands

authorization allowing him to construct 96 linear feet of rip rap revetment; construct a private dock of less than 1,000 square feet; and place 3,500 square feet of fill in non-jurisdictional areas; and whether he qualifies for a general permit to place a fill pad in isolated wetlands adjacent to the St. Johns River, a Class III waterbody.

PRELIMINARY STATEMENT

This matter began on November 5, 1998, when Respondent, Department of Environmental Protection, issued a letter advising Respondent, David Boston, that he "qualified" to "use a noticed general permit to fill less than 4,000 square feet of an isolated wetland to facilitate construction of a single family home"; that the project was not on state owned submerged lands, and therefore he needed no authority from the agency to use those lands for private purposes; and that the project was exempt from the Environmental Resources Program permitting. That matter has been assigned Case No. 99-2861. On January 21, 1999, the agency issued a Notice of Permit Issuance advising interested parties that Respondent, David Boston, was being issued an environmental resource permit and submerged lands authorization to "construct a rip rap revetment and dock" on his property located adjacent to the St. Johns River in Duval County, Florida. That matter has been assigned Case No. 99-1916.

By letter dated January 26, 1999, Petitioner, Vincent R. D'Antoni, Jr., an adjacent property owner, objected to the

issuance of a permit in Case No. 99-1916 on the grounds that the proposed dock would infringe on the navigable area of his own dock; the fill would increase flooding on his property; and the project would harm an endangered fern. On June 1, 1999, Petitioner filed an Amended Petition for Administrative Hearing in Case No. 99-2861 alleging that the applicant does not qualify for a general permit because the filling would cause flooding on Petitioner's property; the stormwater storage function would be "eradicated"; and the use of the permit would diminish water quality and wildlife habitat in the river, thereby adversely affecting the value of his property.

The two matters were referred by the agency to the Division of Administrative Hearings on April 28 and June 30, 1999, respectively, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. At the request of the agency, both cases were consolidated by Order dated August 20, 1999.

By Notice of Hearing dated June 10, 1999, a final hearing was scheduled in Case No. 99-1916 on September 28, 1999, in Jacksonville, Florida. Later, however, the order of consolidation provided that both matters would be heard at that time. On September 22, 1999, the cases were transferred from Administrative Law Judge P. Michael Ruff to the undersigned.

At the final hearing on September 28, 1999, the Department of Environmental Protection made an ore tenus request for a

continuance on the ground that it needed to depose Petitioner's expert witness. The unopposed request was granted, and the matters were later rescheduled to January 27, 2000, in Jacksonville, Florida. A continued hearing was held by telephone on February 21, 2000, for the limited purpose of allowing Petitioner's engineering expert to present rebuttal testimony.

At the final hearing, Petitioner testified on his own behalf and presented the testimony of his wife, Nancy N. D'Antoni, and Ronnie D. Perron, a professional engineer. Also, he offered Petitioner's Exhibit Nos. 1-6, which were received in evidence. Petitioner's Exhibit No. 1 is the deposition testimony of Ronnie D. Perron. Respondent, Department of Environmental Protection, presented the testimony of Michael Eaton, manager of environmental resource permitting and accepted as an expert in permitting and environmental impact of projects on wetlands and surface waters; Robert M. Dunne, an environmental specialist II; David P. Apple, a professional engineer and accepted as an expert in stormwater engineering and design; and Respondent, David Boston. Also, it offered Respondent's Exhibit Nos. 1-14. All exhibits were received in evidence.

The Transcript of the hearing (two volumes) was filed on February 25, 2000. Proposed Findings of Fact and Conclusions of Law were filed by the Department of Environmental Protection on March 10, 2000, and they have been considered by the undersigned

in the preparation of this Recommended Order. None were filed by the other parties.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. In this permitting dispute between neighbors, Petitioner, Vincent R. D'Antoni, Jr., contends generally that Respondent, David Boston (Boston), will cause flooding to Petitioner's property by reason of placing too much fill on an isolated wetland, which lies in the center of Boston's property. The filling is in conjunction with Boston's efforts to construct a single-family residence and private dock on his property, purchased in June 1998, which lies adjacent to the St. Johns River, a Class III waterbody, in Duval County, Florida.

2. In preliminary decisions made on November 5, 1998, and January 21, 1999, Respondent, Department of Environmental Protection (DEP), "acknowledge[d] receipt" of Boston's intent to use a noticed general permit "to fill less than 4,000 square feet of an isolated wetland to facilitate construction of a single family home" on his lot (Case No. 99-2861), and gave notice of its intent to issue Boston an environmental resource permit and sovereign submerged lands authorization allowing him to construct a rip rap revetment and a dock and to place 3,500 square feet of fill in mainly non-jurisdictional areas (Case No. 99-1916).

3. Although a number of objections were raised by Petitioner in his original filings, as clarified at the final hearing, Petitioner now contends that Boston placed excessive fill on his lot, including an isolated wetland, and that the fill has resulted in flooding, saturated soil, or standing water on Petitioner's property. He also contends that the location of Boston's proposed dock will affect the ability to use his own dock. Because no evidence was presented on the docking issue, and through admissions Petitioner acknowledged that there will be no adverse environmental impacts, no consideration will be given to those objections. Finally, Petitioner does not object to the placement of the rip rap revetment on the shoreline. Accordingly, the request for an environmental resource permit and consent to use sovereign submerged lands in Case No. 99-1916 should be approved.

4. The property in issue lies just south of the Jacksonville University Country Club and a few blocks west of University Boulevard North on Wayland Street, which fronts the eastern side of the St. Johns River in a tract of land known as University Park. Except for the Boston lot, all other waterfront lots are now developed. When facing the river from Wayland Street, Petitioner's lot lies to the right of Boston's lot, while another lot owned by Robert Henderson (Henderson) lies to the left of Boston's lot. The lots are up to 500 feet deep; Boston's lot is around 96 feet wide, while Petitioner's lot has a similar

width but narrows to only 20 feet or so near the river.

5. At the river end of the D'Antoni, Boston, and Henderson lots is an area of contiguous wetlands. Until 1995, DEP regulated those wetland areas and this prevented D'Antoni and Henderson from placing any fill in those areas. Under DEP's current wetland delineation rule, however, such areas are non-jurisdictional, and any placement of fill at the river end is outside the purview of DEP's jurisdiction.

6. Before Boston's lot was cleared and filled, it was about a foot lower in elevation than the D'Antoni lot; this was true even though Petitioner has never changed the natural grade of his property since it was purchased and developed. Therefore, water tended to flow naturally from an upland area north or east of the D'Antoni lot, through the D'Antoni lot to Boston's lot, and then through the lower part of the Henderson lot populated by "very mature cypress trees," and eventually into the St. Johns River.

7. According to a 1977 aerial photograph, the Boston lot contained what appears to be a tidal connection from an uplands area through the wetlands on his property to the river. However, construction on property adjacent to the Henderson lot sometime after 1977 severed this connection, and a tidal connection (direct hydrologic connection) to the river no longer exists.

8. Under Rule 62-341.475(1)(f), Florida Administrative Code, "a single family residence" is exempt from the

Environmental Resource Program permitting and a general permit will be granted "as long as it is not part of a larger plan of common development," and "the total area of dredging or filling in isolated wetlands for the residence and associated residential improvement shall not exceed 4000 square feet." Since there is no longer a direct hydrologic connection between the wetlands on Boston's property and the St. Johns River, the wetlands are isolated within the meaning of this rule.

9. Availing himself of the foregoing provision, on October 19, 1998, Boston gave notice to DEP "of [his] intent to use a noticed general permit to fill less than 4,000 square feet of an isolated wetland" on his property. He also provided certain drawings and other information (prepared by his surveyor) to show that he qualified for the permit. DEP does not "issue" a noticed general permit; rather, it only determines whether the applicant qualifies for a permit and then "acknowledges" this fact. Accordingly, on November 5, 1998, DEP "acknowledge[d] receipt" of Boston's notice.

10. Although DEP encourages the user of such a permit to notify affected or adjoining property owners, there was no legal requirement that Boston do so, and he proceeded to clear the lot and then fill a part of the wetland area with two or three feet of dirt without giving notice to Petitioner or Henderson, his two neighbors. The filling raised the elevation of the Boston property at least two feet above the D'Antoni and Henderson lots

and impeded the prior natural flow of water. At the same time, Boston constructed a three to four-foot timber wall (consisting of railroad ties) on the Henderson property line to retain the fill and a similar two-foot wall on Petitioner's line. These changes had the effect of impounding the water which had previously flowed naturally in a north-south direction through the wetlands from the D'Antoni lot to the Boston lot to the Henderson lot. It also generated runoff from the Boston lot to the D'Antoni lot, which had not previously occurred.

11. When Petitioner observed the adjacent lot being cleared and filled, and the resulting erosion of fill onto his property, pooling of water, and damage to his chain link fence after a heavy rain in January 1999, he filed a complaint with DEP. An inspection was made by DEP, and Boston was told to stop work until corrective changes were made to ensure that such flooding would not occur. After a series of changes were made which satisfied DEP's concerns, the stop work order was lifted. Boston also signed a consent order and paid a $100.00 fine. However, pending the outcome of these cases, no further construction work has occurred.

12. Petitioner has contended that Boston has placed more than 7,200 square feet of fill on his property in violation of the rule, which limits the amount of fill to less than 4,000 square feet. While this amount of filling has in fact occurred, approximately 3,500 square feet of fill was placed in non-

jurisdictional areas between the shoreline and the isolated wetlands, and the rule only requires that Boston limit his fill to less than 4,000 square feet on the isolated wetland. Thus, contrary to a suggestion by Petitioner's engineer, the jurisdictional and non-jurisdictional filling are not totaled together to determine whether the threshold within the rule has been exceeded.

13. Through photographs received in evidence and testimony by Petitioner and his wife, it was established that flooding or standing water has occurred on Petitioner's property during heavy rainfalls since the filling occurred, even as recently as January 2000. The evidence further shows that Petitioner's chain link fence has been damaged through the weight of the fill pressing against the fence. In addition, Petitioner has suffered the loss of "a couple of trees" because of "mucky" and "oversaturated" soil caused by excessive water. Also, a dog house on a raised platform in the back yard which was previously dry now "stays in water." These affected areas lie immediately adjacent to the filled area of the isolated wetland on Boston's property. Finally, there is an erosion problem beyond the isolated wetland consisting of sand and silt flowing from Boston's lot onto Petitioner's lot during heavy rainfalls. Despite these problems, Petitioner does not object to the development of the lot; he only asks that Boston do so in a

manner which prevents these conditions from recurring in the future.

14. Petitioner's engineering expert, Ronnie D. Perron (Perron), a professional engineer who visited the site in August 1999, ran a computer model (Interconnected Channel and Pond Routing, Version 2.11) showing runoff both before and after the fill was placed on Boston's lot. He concluded that "there was over one and a half feet of flooding in that wetlands due to filling Mr. Boston's lot" during a "mean annual storm event," which assumes five inches of rain during a 24-hour period. Even when he used more conservative estimates, Perron still arrived at water accumulations ranging from 0.6 feet to 1.5 feet. This excessive runoff is caused by the retaining wall and fill, which "blocks off" the water and causes it to "spread out in [Petitioner's] whole back yard."

15. In response to Perron's model, a DEP professional engineer, David P. Apple (Apple), ran another computer model (PONDS, Version 2.25) received in evidence as Respondent's Exhibit No. 14. That model shows that during a three-year, one-hour storm event, the small depressed area on Boston's property (including the isolated wetland) had sufficient storage capacity to absorb up to six inches of runoff from off-site areas and not overflow back onto Petitioner's property. This size of storm event (which produces two and one-half inches of rain in an hour) is typically used by the Department in calculations for single-

family residential property when the impervious area site is less than fifty percent. In this case, Apple didn't "feel that the impervious area out there was greater than [fifty] percent." Therefore, Apple concluded that the storm event used by Perron was too large, and that the smaller event used in his model was more appropriate. He also concluded that the Boston property could retain all water in a normal storm event without discharging any stormwater onto the D'Antoni lot. He did not, however, address the issue of the fill and retaining wall on the Boston lot impounding the water on his neighbor's lot.

16. In developing the input perameters for his model, Apple assumed that water falling at the front (Wayward Street) side of the D'Antoni property drained to the front roadway; in fact, much of that water drains to the rear of the lot into the wetland area. A similar incorrect assumption was made regarding runoff on the Boston lot. If modifications were made to account for the proper drainage patterns, the Apple model would show larger amounts of water staging on the Boston property during rainfall events, which would increase the possibility of runoff onto the D'Antoni lot.

17. Apple questioned the accuracy of the Perron model given the fact that Perron had used a larger storm event than he (Apple) believed was appropriate. However, even if Perron had used a three-year, one-hour storm event on his computer model, as advocated by Apple, he established that it would have resulted in

flood staging on Petitioner's property between 0.97 and 1.64 feet during a smaller storm event.

18. DEP proposed no solutions to the water problems on the D'Antoni lot, presumably because it concluded that the rule was satisfied; that by filling the Boston lot, it was no longer the "stormwater pond for the neighborhood runoff"; and that DEP had no other regulatory authority to solve this peculiar situation. The record shows clearly, however, that if no changes are made, water will continue to back up on Petitioner's property by virtue of the higher elevation on the Boston lot, and the possibility of runoff from Boston's lot exists during certain storm events. Neither condition existed before the fill was added.

19. To correct the foregoing conditions, Perron proposes two corrective measures. First, Boston should install a yard drain (underground culvert) beginning in the wetlands area of his property and outfalling to the cypress trees on the adjacent Henderson lot. Besides providing an outfall for the excess water, this would also help recharge the mature cypress trees on the Henderson lot. Second, D'Antoni should install a series of "yard drains" using high-density polyethylene pipes to convey the standing water on his lot directly into the St. Johns River. The expert opined that neither activity would require a permit from DEP. These modifications are reasonable and appropriate and should be used by the factioning parties. Accordingly, the

installation of a yard drain should be a condition for Boston to use his noticed general permit.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

21. As the party filing an application, Boston bears the burden of proving by a preponderance of the evidence that he is entitled to an environmental resource permit and sovereign submerged lands authorization and that he is qualified to use the noticed general permit. See, e.g., Cordes v. State, Dep't of Envir. Reg., 582 So. 2d 652, 654 (Fla. 1st DCA 1991)(permit generally); Castoro et al. v. Palmer and Dep't of Envir. Prot., Case Nos. 95-5879 and 96-0736 (Dep't of Envir. Prot., October 16, 1998) (noticed general permit).

22. Because Petitioner either withdrew his objections, admitted through requests for admission, or failed to present any proof regarding the issues involved in Case No. 99-1916, Boston's application for an environmental resource permit and consent to sovereign submerged lands should be approved. This will allow him to construct 96 linear feet of rip rap revetment at the mean high water mark of the St. Johns River, construct a private dock of less than 1,000 square feet, and place 3,500 square feet of fill on non-jurisdictional areas of his property.

23. Rule 62-341.475, Florida Administrative Code, governs the use of noticed general permits for minor activities, a type of permit for which Boston seeks qualification to use in Case No. 99-2861. Pertinent to this controversy are the disputed criteria found in Sections (1) and (2) of the rule. Subparagraphs (1)(f)3. and 4. require that the filling be limited to "isolated wetlands," and that it "not exceed 4000 square feet," while Paragraph (2)(c) requires that the filling "not impede the conveyance of a stream, river[,] or other watercourse in a manner that would increase off-site flooding."

24. The evidence is undisputed that the jurisdictional filling on Boston's property will be limited to less than 4,000 square feet in an isolated wetland. In addition, the evidence shows that there is no stream, river, or other watercourse within the meaning of DEP rules or statutes on the isolated wetland. Therefore, because no watercourse exists on the property, the filling cannot increase the type of off-site flooding envisioned by the regulation. Assuming this analysis to be correct, then the computer modeling by both experts was an academic exercise since any off-site flooding which might be increased because of the filling would not affect Boston's qualifications to use this type of permit.

25. Even so, it is clear that the filling impedes the natural flow of water that occurred before the changes were made. As noted in the Findings of Fact, during heavy rains which have

occurred as recently as January 2000, the D'Antoni lot has suffered standing water and saturated soil, erosion of sand and silt from the Boston lot, and damage to a chain link fence. If this forum can provide no relief, then D'Antoni can only hope that the drought conditions prevelant in northeast Florida will continue for an indefinite period of time, or he can raise the elevation of his lot by adding at least two feet of fill. For obvious reasons, neither alternative is practical.

26. Given these considerations, the solution offered by Witness Perron is both reasonable and appropriate and should be incorporated into the use of any noticed general permit. This will result in both parties bearing the cost of making improvements to their respective lots and should alleviate the conditions now experienced by Petitioner.

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 granting the application for a permit and consent in Case No. 99-1916 and confirming that David Boston qualifies for use of a noticed general permit in Case No. 99-2861 provided, however, that such use be conditioned on Boston constructing an underground culvert with a yard drain from the wetland area on his lot to the St. Johns River.

DONE AND ENTERED this 22nd day of March, 2000, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
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 enter a final order in this case.