

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LARRY M. ALBRIGHT,)
)
 Petitioner,)
)
 vs.) Case No. 99-2212
)
 RICHARD G. MANNER and)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on November 16, 1999, in Fort Myers, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Steven C. Hartsell, Esquire
Pavese, Haverfield, Dalton,
Harrison & Jensen, L.L.P.
1833 Hendry Street
Post Office Drawer 1507
Fort Myers, Florida 33902

For Respondent Manner: Michael J. Ciccarone, Esquire
Annis, Mitchell, Cockey,
Edwards & Roehn, P.A.
Post Office Box 60259
Fort Myers, Florida 33906-6259

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

STATEMENT OF THE ISSUE

The issue presented for decision in this case is whether Respondent Richard G. Manner is entitled to an after-the-fact coastal construction control line ("CCCL") permit for construction seaward of the CCCL on the Gulf of Mexico at Fort Myers Beach, Florida.

PRELIMINARY STATEMENT

By order dated December 10, 1998, the Department of Environmental Protection ("DEP") granted Permit No. LE-823 ATF, an "After-The-Fact Permit for Construction or Other Activities Pursuant to Section 161.053, Florida Statutes" (the "Permit") to Respondent Richard G. Manner ("Respondent"). By letter to E. Olu Sawyerr of DEP, dated December 29, 1998, Petitioner Larry M. Albright objected to issuance of the permit and requested additional time to retain legal counsel and file a formal administrative petition. The record does not unequivocally indicate that this request for additional time was granted, but neither Respondent nor DEP objected to the timeliness of the petition. By letter to DEP's Office of General Counsel, dated April 28, 1999, Petitioner requested an administrative hearing. On May 17, 1999, DEP forwarded the matter to the Division of Administrative Hearings for assignment of an Administrative Law Judge and the conduct of a formal administrative hearing in this matter, pursuant to Section 120.57(1), Florida Statutes. The case was assigned to the undersigned and scheduled for hearing on

September 17, 1999. Pursuant to Respondent's motion, the hearing was continued and rescheduled for November 16, 1999.

At the final hearing, Petitioner presented the testimony of Eric Olu Sawyerr, the processing engineer for DEP who prepared, processed, and recommended for approval Respondent's application. Respondent also presented the testimony of Mr. Sawyerr.

Petitioner offered no exhibits. Respondent Richard G. Manner's, Exhibits 1-7 were admitted into evidence. Respondent Richard G. Manner proffered Exhibits 8-10 as rebuttal exhibits should the undersigned rule in favor of Petitioner's contention that certain post-permit activities undertaken by Respondent are relevant to this proceeding. It is found that the post-permit activities are not relevant to this proceeding, and thus that Exhibits 8-10 are not admitted.

At the hearing, counsel for DEP submitted for official recognition a document purporting to be the text of Chapter 62B-33, Florida Administrative Code. This document was used by the parties at the hearing, and its text and numeration of rule provisions is reflected in the transcript. In his post-hearing submittals, Petitioner pointed out that the document submitted by DEP contained numerous inaccuracies and inconsistencies. The undersigned's own review of the document confirmed Petitioner's observation. The references to sections of Chapter 62B-33, Florida Administrative Code, contained in this Recommended Order

reflect the official language and numeration of those provisions, not the flawed language of the document submitted by counsel for DEP.

A Transcript of the final hearing was filed on December 3, 1999. The parties stipulated that their proposed recommended orders would be timely if filed on or before December 17, 1999. Petitioner filed a Proposed Recommended Order on December 16, 1999. Respondent sent a Proposed Recommended Order by facsimile transmission after the close of business on December 17, 1999, which was deemed filed on December 20, 1999. No party objected to the late filing, and no party was prejudiced thereby. DEP did not submit a proposed recommended order.

FINDINGS OF FACT

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

1. Respondent owns an existing one-story, single family stilt house located on the beach front on the Gulf of Mexico at Fort Myers Beach. The house is situated seaward of the CCCL.

2. Petitioner owns a house that is an "immediately adjacent property" as defined in Rule 62B-33.002(28), Florida Administrative Code, and is thus a person whose substantial interests are affected by DEP's intent to issue the Permit.

3. At some point prior to May 18, 1998, Respondent built additions to the existing one-story stilt house by adding two

bedrooms and two bathrooms to the ground level beneath the stilt house, adding lattice work, and extending a wooden deck, all without applying for a DEP permit.

4. On January 20, 1998, DEP cited Respondent for the unauthorized destruction of native salt-tolerant vegetation seaward of the CCCL. DEP required Respondent to restore the vegetation.

5. On May 18, 1998, DEP reported additional unauthorized activity seaward of the CCCL. DEP discovered the unpermitted two-bedroom, two-bathroom addition that Respondent had built in the open area underneath the one-story stilt home, as well as the elevated wooden deck extension and lattice work enclosure. DEP concluded that "the unauthorized construction is a major violation of Section 161.053, Florida Statutes. Richard Manner, as an owner of gulffront [sic] property, knew or should have known that a [DEP] permit was required for this activity."

6. DEP records indicate that on June 25, 1998, Respondent filed an after-the-fact application. The application itself was not entered into the record of this proceeding. Mr. Sawyerr, the DEP processing engineer for CCCL permits in Lee and Collier counties, testified that the application described the project as "remodeling the interior of the first floor and replace flooring of the deck and square off and install additional lattice work on the existing deck and install a fence." This description was misleading, in that it made no mention of the new construction in

the open area beneath the stilt house, and did not disclose that the existing deck had been extended.

7. Mr. Sawyerr testified that the first step in processing an application is to review it for completeness, then apply the requirements of DEP's rules and governing statutes to the completed application in a substantive review of the proposed project.

8. Mr. Sawyerr testified that the most important rules for this review were Rule 62B-33.007, Florida Administrative Code, which sets forth the structural and other requirements necessary for permit approval, and Rule 62B-33.008, Florida Administrative Code, which sets forth the permit application requirements.

9. The general requirements for obtaining a permit state that "the applicant shall provide the Department with sufficient information pertaining to the proposed project to show that any impacts associated with the construction have been minimized and that the construction will not result in a significant adverse impact." Rule 62B-33.005(2), Florida Administrative Code. An applicant must demonstrate that a permit is "clearly justified" by demonstrating that all standards, guidelines and other requirements of Part I, Chapter 161, Florida Statutes, have been met.

10. Rule 62B-33.007(1), Florida Administrative Code, requires that all structures be designed to minimize any expected adverse impact on the beach-dune system, marine turtles, or

adjacent properties and structures, and be designed consistent with Rule 62B-33.005, Florida Administrative Code.

11. Rule 62B-33.007(2), Florida Administrative Code, requires that habitable major structures that extend wholly or partially seaward of the CCCL be designed to resist the predicted forces associated with a 100-year storm event.

12. Mr. Sawyerr testified that Respondent's house is a "habitable major structure," as that term is defined in Rule 62B-33.002(54)(e)2, Florida Administrative Code, and used in Rule 62B-33.007(2), Florida Administrative Code.

13. Rule 62B-33.007(3), Florida Administrative Code, sets forth a series of requirements that must be met by major structures. Rule 62B-33.007(3)(a) provides that habitable major structures must be designed in accordance with the minimum building code adopted for the area.

14. Mr. Sawyerr testified that Respondent provided evidence that the minimum building code was met via a letter, dated June 18, 1998, from Bob Stewart, Deputy Director of Lee County's Division of Community Development. The operative text of the letter states: "The project currently does not contravene zoning codes and is generally consistent with the Lee County Land Development Code."

15. Mr. Sawyerr testified that DEP does not undertake an independent investigation of an applicant's compliance with local codes. Rather, DEP relies on representations made by local

government, such as found in Mr. Stewart's letter. This practice is authorized by Rule 62B-33.008(1)(d), Florida Administrative Code, which requires an application to include written evidence provided by the appropriate local government agency that the proposed activity does not contravene local setback requirements, zoning or building codes, and is consistent with the state-approved local comprehensive plan.

16. Mr. Sawyerr testified that DEP read Mr. Stewart's letter to be inclusive of the building code. Under cross-examination, Mr. Sawyerr admitted that the letter does not expressly address the minimum building codes. However, the Lee County Land Development Code, Chapter 6, Article II, Division 3, includes the minimum building code for Lee County. Thus, Mr. Sawyerr was correct to accept Mr. Stewart's letter as evidence the project met the minimum building code.

17. Rule 62B-33.007(3)(b), Florida Administrative Code, provides that major structures must be designed in accordance with minimum design load standards adopted by the American Society of Civil Engineering, and that an engineer or architect must provide separate certification that the main wind-force resisting system has been designed in accordance with those standards. The engineer or architect must also certify that the components and cladding have been selected and incorporated into the design to withstand the wind loads determined in accordance

with the standards. Mr. Sawyerr testified that Respondent provided none of the information required by Rule 62B-33.007(3)(b).

18. Rule 62B-33.007(3)(c), Florida Administrative Code, provides:

All habitable major structures shall be elevated on, and securely anchored to, an adequate pile foundation in such a manner as to locate the building support structure above the design breaking wave crests or wave approach as superimposed on the storm surge with dynamic wave setup of a one-hundred year storm. The storm surge with dynamic wave setup of a one-hundred year storm shall be the elevation determined by the Department in studies published as a part of the coastal construction control establishment process. The Bureau will evaluate the applicant's proposed structural elevation based upon available scientific and coastal engineering data and will advise the applicant of the specific elevation requirement for the site. The Department will grant a waiver of the elevation or foundation requirements for additions, repairs or modifications to existing nonconforming habitable major structures, provided that the addition, repair or modification does not advance the seaward limits of construction at the site and does not constitute rebuilding of the existing structure. Staff evaluation in such cases will be based on engineering data, site elevations, any impact on the beach and dune system, and design life of the structure.

19. Mr. Sawyerr testified that the quoted foundation and elevation requirements were waived by DEP, based upon evidence submitted by Respondent that the proposed addition did not constitute a substantial improvement, and Respondent's submitted estimate of the cost of the improvement compared to the value of

the property overall. Neither the evidence regarding the addition's status as a "substantial improvement" nor the cost estimates were made a part of the record in this proceeding.

20. Mr. Sawyerr testified that Respondent provided none of the engineering data, site elevations, information regarding impact on the beach and dune system, or design life of the structure, required by Rule 62B-33.007(3)(c) as the basis of the staff evaluation leading to a waiver of the foundation and elevation requirements.

21. In summary, neither Respondent nor DEP submitted any documentary evidence to support DEP's decision to waive the foundation and elevation requirements of Rule 62B-33.007(3)(c), or even to demonstrate that DEP followed the substantive requirements of its own rule in granting the waiver.

22. Rule 62B-33.007(3)(f), Florida Administrative Code, provides that no substantial walls or partitions may be constructed below the level of the first finished floor of habitable major structures and seaward of the CCCL. Rule 62B-33.007(3)(f) further provides that its prohibition does not preclude the grant of a permit for "break-away or frangible walls."

23. Mr. Sawyerr testified that DEP received "no engineering data whatsoever" indicating that the construction below the first floor level of Respondent's stilt house would meet the requirements for "break-away or frangible walls."

24. Rule 62B-33.008(1)(f), Florida Administrative Code, requires that the applicant submit two copies of a topographic survey drawing of the subject property. The rule sets forth 16 specific items of information that must be contained in the topographic survey drawing.

25. Mr. Sawyerr testified that Respondent submitted no topographic survey drawings, but only a boundary survey of the property. Mr. Sawyerr stated that the boundary survey contained some of the information required by Rule 62B-33.008(1)(f), Florida Administrative Code.

26. However, Mr. Sawyerr testified that the boundary survey did not contain the location of the contour line corresponding to elevation 0 National Geodetic Vertical Datum ("NGVD"), the location of the seasonal high-water line in relation to the CCCL, or the date that the legal description of the CCCL used for the survey was recorded in the county records. All of this information is required by the cited rule provision. The boundary survey itself was not submitted into evidence.

27. Rule 62B-33.008(1)(g), Florida Administrative Code, requires that the applicant submit one copy of a dimensioned site plan drawing to an appropriate scale showing the location of the proposed structure and the location and volume of any proposed excavation or fill, and all distances and locations referenced in Rule 62B-33.008(1)(f).

28. Mr. Sawyerr testified that the submitted drawing was not drafted to scale and did not include the required distances and locations. The drawing itself was not submitted into evidence.

29. Rule 62B-33.008(1)(h), Florida Administrative Code, requires that the applicant submit one copy of a dimensioned cross-sectional drawing to an appropriate scale showing: all subgrade construction or excavation with elevations referenced to the NGVD; a typical cross-section view of the structural components above grade with elevations for the underside support structure and crest elevations for any proposed coastal or shore protection structure; the location of the CCCL; a typical profile of the existing and proposed grade at the site; and the location of the contour line corresponding to elevation 0 NGVD. Mr. Sawyerr testified that Respondent did not submit such a drawing.

30. Rule 62B-33.008(1)(j), Florida Administrative Code, requires that the applicant submit two copies of detailed final construction plans and specifications for all proposed structures, signed and sealed by the design engineer or architect. Mr. Sawyerr testified that Respondent did not submit these plans and specifications, despite the fact that the construction was essentially complete at the time the application was submitted.

31. Mr. Sawyerr testified that when he reviewed the application, he believed that Respondent was proposing interior remodeling of the existing living space of his house.

32. Mr. Sawyerr stated that the usual practice of DEP is to send a field representative to the site to take photos and send in a description of the property. He then compares the site inspection report to the proposal in the application, and "we would draw whatever conclusions we need to."

33. Jennifer Cowart was the field inspector sent out to Respondent's property. She filed a site inspection report on or about October 1, 1998. Ms. Cowart's report concluded that Respondent should be required to remove all of the new construction, because the two bedroom, two bathroom addition was not "remodeling" as represented in the application, and because what was represented in the application as replacement of flooring of an existing deck was actually an expansion of the deck.

34. Mr. Sawyerr testified that the documents submitted by Respondent do not provide sufficient information to form an objective judgment whether Respondent's construction meets the requirements of DEP's rules.

35. Despite the misleading and omitted information in the application, the permit was issued for the following items:

1. An after-the-fact addition of an understructure habitable space of maximum dimensions 30 feet shore-normal

- by 24 feet shore-parallel to an existing non-conforming single family dwelling.
2. After-the-fact breakaway lattice walls below deck and building.
3. After-the-fact enlargement of existing wooden deck to dimensions 28 feet maximum shore-normal by 32 feet maximum shore-parallel.
4. Installation of a fence.

36. The permit also contained several special conditions, including the following:

1. The permittee shall submit two copies of as-built plans for the understructure addition within 60 days from the date of this final order. These plans shall be signed and sealed by an engineer registered in the State of Florida, and shall be certified to not increase the potential for damage to the existing dwelling unit during coastal storm events.

37. The final order issuing the after-the-fact permit was issued on December 10, 1998. As of the date of the hearing, Respondent had yet to submit the as-built plans for the understructure additions, thus violating the express terms of special condition number 1.

38. Mr. Sawyerr testified that it is not unusual for DEP to issue an after-the-fact permit with conditions requiring that certain information be submitted after issuance of the permit, though the text of the rules call for that information to be submitted prior to issuance of the permit. Mr. Sawyerr stated that it is not unusual to require a permittee to submit signed and sealed engineering plans as a permit condition.

39. Mr. Sawyerr acknowledged that the addition of the understructure habitable space and enlargement of the existing wooden deck without permits constituted a violation of Chapter 161, Florida Statutes. He stated that, rather than dealing with that violation as part of the permitting process, DEP determined to grant the permit and initiate a separate enforcement proceeding to deal with the violations.

40. Respondent failed to establish a prima facie case of entitlement to the permit. The only documentary evidence submitted as proof at the hearing was the permit itself and a cursory memorandum from Mr. Sawyerr. The permit application was not made a part of the record. Mr. Sawyerr testified generally as to "evidence" submitted by Respondent that led him to recommend waiver of the elevation and foundation requirements of the building code, but none of this evidence was submitted at the hearing. None of the site plan drawings were submitted at the hearing.

41. Mr. Sawyerr's own testimony established that Respondent's application did not include information required by Rules 62B-33.007(3)(b),(c),(f) and 62B-33.008(1)(f),(g),(h), and (j), Florida Administrative Code. Mr. Sawyerr admitted that the application was misleading, and that he did not learn the true nature of the unpermitted improvements to Respondent's house until his field inspector submitted her site inspection report. Mr. Sawyerr testified that the materials submitted by Respondent

do not provide data sufficient to allow an objective judgment whether Respondent's construction meets the requirements of DEP's rules.

42. Mr. Sawyerr's testimony established that, in spite of the many deficiencies in the application, the permit was nonetheless issued with a special condition requiring Respondent to submit two copies of the as-built plans for the understructure addition within 60 days, and that Respondent proceeded to ignore that special condition. As of the date of the hearing, more than eleven months after issuance of the permit, Respondent had yet to submit those plans. Respondent did not submit the plans at the hearing.

43. Respondent contended that DEP properly analyzed the application and concluded that the proposed project met the requirements of all applicable rules and statutes. However, beyond the testimony of Mr. Sawyerr, Respondent offered no evidence that would permit this tribunal to test the merits of that contention. Mr. Sawyerr's conclusion that his recommendation was proper does not alone establish a prima facie case for granting the permit.

44. Respondent also asserted that Petitioner's case constituted an attack on DEP's authority to waive certain permit requirements and to grant after-the-fact permits. This assertion is without merit. DEP's waiver and permitting authority was unquestioned. Respondent simply failed to offer any documentary

evidence in support of DEP's exercise of that authority in this case. Mr. Sawyerr's vague reference to "evidence" submitted by Respondent is not a substitute for the documents upon which DEP based its waiver and permitting determinations.

CONCLUSIONS OF LAW

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

46. As the owner of a house that is an "immediately adjacent property," as that term is defined in Rule 62B-33.002(28), Florida Administrative Code, Petitioner is a person whose substantial interests are affected by DEP's intent to issue the permit, and thus has standing to bring this proceeding.

47. As the applicant and the party asserting an affirmative entitlement to issuance of an after-the-fact permit by DEP, Respondent has the burden of showing by a preponderance of the credible and credited evidence that it is entitled to that permit. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 789 (Fla. 1st DCA 1981). Rule 62B-33.005(4), Florida Administrative Code, provides that the applicant must show that the requested permit is "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 Chapter 62B-33, Florida Administrative Code, have been met.

48. In the cited case, the First District Court of Appeal wrote:

We think it is essential, both for the benefit of a hearing officer and the petitioning objectors (to say nothing of the agency and the appellate court) to have on record a basic foundation of evidence pertaining to the application so that the issues can be understood, and so that evidence directed to these issues by the petitioning objectors can be properly evaluated. At the very minimum, this preliminary showing should include the application, and the accompanying documentation and information relied upon by the agency as a basis for the issuance of its notice of intent. To what extent it would be advisable or necessary for this preliminary presentation by the applicant to be further expanded would depend, to a large extent, on the nature of the objections raised by the petitioners requesting a hearing.

J.W.C. Company, 396 So. 2d at 788.

49. Respondent in this case has failed to meet the "very minimum . . . preliminary showing" that the court deemed necessary to establish a prima facie case of entitlement to a permit. Neither the application nor any of the supporting documentation and information relied upon by the agency was presented in evidence.

50. Rather, Respondent relied entirely on the testimonial recollections of Mr. Sawyerr to establish the contents of the application and other materials submitted by Respondent, and on

Mr. Sawyerr's conclusion as to the sufficiency of those materials to establish entitlement to the permit.

51. Respondent's presentation of the case assumed that which was to be proven: that Mr. Sawyerr's evaluation of the application and supporting materials was sound and that DEP's decision to award the permit was supported by the evidence and was consistent with its governing rules and statutes. These factual matters could not be established by having Mr. Sawyerr testify that his evaluation was sound and the decision to award the permit was proper, without presenting any of the supporting documentation.

52. The facts of the case established that Respondent has ignored the permitting requirements in building the additions to his house, has submitted a permit application that appeared designed to mislead DEP as to the nature of the additions, and has disregarded the special conditions of the permit.

53. The facts of the case established that Respondent's application omitted material items required by Rules 62B-33.007 and 62B-33.008, Florida Administrative Code. To justify these omissions, Respondent offered only Mr. Sawyerr's conclusory statements that these items had been waived.

54. The record in this case does not clearly justify issuance of an after-the-fact permit. DEP should deny the permit and either order removal of Respondent's unpermitted additions,

or require Respondent to submit an application meeting all of the requirements of Chapter 62B-33, Florida Administrative Code.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is recommended that the Department of Environmental Protection enter a final order that denies Permit No. LE-823 ATF and establishes a date certain by which Respondent must either remove the unpermitted understructure habitable space, lattice walls, and deck enlargement, or submit a complete after-the-fact CCCL application that meets all requirements of Chapter 62B-33, Florida Administrative Code.

DONE AND ENTERED this 25th day of April, 2000, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of April, 2000.

COPIES FURNISHED:

Steven C. Hartsell, Esquire
Pavese, Haverfield, Dalton,
Harrison & Jensen, L.L.P.
1833 Hendry Street
Post Office Drawer 1507
Fort Myers, Florida 33902

Michael J. Ciccarone, Esquire
Annis, Mitchell, Cockey,
Edwards & Roehn, P.A.
Post Office Box 60259
Fort Myers, Florida 33906-6259

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

Kathy Carter, Agency Clerk
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

Teri Donaldson, General Counsel
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

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.