STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner, vs. JOHN LAY and JANET LAY, Respondents.	)	Case Nos. 01-1541 01-1542

RECOMMENDED ORDER

On June 29, 2001, a final administrative hearing was held in these cases before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH). The hearing was conducted by televideo connecting hearing locations in Tallahassee and Fort Myers, Florida.

APPEARANCES

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

For Respondents: John Lay and Janet Lay, pro se
3901 Southwest 27th Court
Cape Coral, Florida 33914

STATEMENT OF THE ISSUE

The issue is whether the Department of Environmental Protection (DEP) should revoke two consents of use issued to the

Lays for construction of an exempt dock on Cayo Costa Island near Pelican Bay in Lee County.

PRELIMINARY STATEMENT

On January 18, 2001, DEP gave notice of intent to revoke the Lays' two consents of use. The next day, the Lays requested administrative proceedings, which were referred to DOAH on April 25, 2001. (The reason for the delay is not clear from the record.) At DOAH, the two cases were consolidated and set for final hearing on June 29, 2001. Later, final hearing was converted to televideo.

At final hearing, DEP called Mark Miller, its environmental manager in the submerged lands and environmental resources program in DEP's South District office in Fort Myers, Florida. DEP also had DEP Exhibits 1-16 admitted in evidence. The Lays testified in their own behalf and had Respondents' Exhibits 1, A, C, E, G, H, and I (the latter being photographs filed after the hearing) admitted in evidence. DEP recalled Miller in rebuttal.

DEP ordered a transcript of final hearing, and the parties were given ten days from filing of the transcript in which to file proposed recommended orders (PROs). The Transcript was filed on July 9, 2001. Only DEP filed a PRO, which has been considered.

FINDINGS OF FACT

1. In spring 2000, after contracting to purchase Lots 16 and 17 in the Cayo Costa Subdivision on Cayo Costa Island in Lee County, but before closing, the Lays contacted Peggy Grant, an environmental specialist in DEP's South District office in Fort Myers, Florida, to inquire whether it would be possible to construct a single-family dock on and over sovereign submerged land owned by the State of Florida in a lagoon west of Pelican Bay. The Lays testified without contradiction that, in making their inquiry, they showed Grant a boundary survey of the property. The boundary survey showed that there was a strip of road easement above the mean high water (MHW) line east of all of Lots 16 and 17 except for the extreme southeast corner of the lots. According to the Lays, again without direct contradiction, Grant told them that it would be possible to construct a dock into the lagoon because the lots were riparian to the lagoon at least at the southeast corner. It was not clear from the evidence whether Grant told the Lays that their dock could emanate from parts of their lots other than the southeast corner. The Lays subsequently closed on the property.

2. On July 12, 2000, the Lays filed a consolidated application for exemption from the need to obtain an environmental resource permit and for consent of use for a 208 square-foot single-family dock emanating from the easternmost

point of the boundary between Lots 16 and 17--a point from which the dock would have to traverse approximately 10-15 feet of land above MHW designated as roadway easement on the boundary survey.

3. The Lays testified that the boundary survey was part of the application, but no boundary survey was contained in DEP's files, and it is found that the application did not include the boundary survey. It is found that the Lays, in testifying as they did, confused the application submission with the inquiry of Peggy Grant in spring 2000. There was no other information in the application indicating a road easement or the location of MHW.

4. After the Lays filed their application, DEP located the site on an aerial produced by DEP's Geographic Information System and conducted a site visit. During this phase, DEP and the Lays focused on minimizing impact on mangroves bordering the lagoon. Negotiations ensued, and the Lays eventually agreed to submit additional information down-sizing their proposed dock to 58 square feet. The revised application was granted on August 21, 2000, under DEP File No. 36-0172390-001.

5. The consent of use included General Consent Conditions. Among other things, they stated: "The Letter of Consent associated with these General Consent Conditions as well as these conditions themselves are subject to modification after five (5) years in order to reflect any applicable changes in

statutes, rule or policies of the Board [of Trustees of the Internal Improvement Trust Fund] or its designated agent [DEP]." There were no other conditions or statements regarding modification or revocation of the consent of use.

6. After obtaining their exemption and consent of use, the Lays realized they needed a larger dock. On September 11, 2000, they applied for an exemption and consent of use for a 114 square-foot single-family dock. The Lays concede that the boundary survey was not included in this application. This application was granted on October 14, 2000, under DEP File No. 36-0172390-002. It included the same General Consent Conditions as the first consent of use for the 58 square-foot dock and no other conditions or statements regarding modification or revocation of the consent of use.

7. The Lays next approached Lee County for a permit for their dock. They showed Lee County their DEP exemption and consent of use and their boundary survey. On November 13, 2000, Lee County informed the Lays that the County permit could not be issued due to County setback requirements from the road easement shown on the boundary survey. The Lays then asked for consideration of a variance from the setback requirements or vacation of the road easement (which clearly could serve no purpose or be of any use as a road).

8. At that point, the County referred the matter to the County Attorney's office for a legal opinion. On December 29, 2000, a memorandum opinion was prepared to the effect that the road easement, if implicitly offered for dedication by filing of the Second Revised Plat of Cayo Costa Subdivision in the early 1910's, was never accepted by the County. The County surmised that the road easement belonged to the State of Florida. For that reason, no setback requirements from a road easement applied, and the County permit could be issued.

9. The Lays were informed of the County's legal opinion in early January 2001. They were told that the County informed DEP of the legal opinion and the boundary survey and that the Lays could expect to receive their County permit shortly.

10. When DEP was informed about the County's legal opinion, DEP had a copy faxed to its Office of General Counsel in Tallahassee on January 12, 2001, along with a copy of the boundary survey. Upon review of the documentation, DEP came to the conclusion that the Lays were not riparian owners at the point of their proposed dock (at the southeast corner of Lot 16 and northeast corner of Lot 17) as a result of the road easement. On January 18, 2001, DEP gave the Lays notice of DEP's intent to revoke both consents of use (for the 58 and 114 square-foot docks).

11. DEP takes the position not only that it did not have the benefit of the boundary survey in either application for exemption and consent of use but also that it accepted at face value the representations in the applications that the Lays were riparian owners where they proposed to build their dock. Actually, the Lays' applications did not contain explicit representations to riparian ownership. But they did state that the Lays owned "the property described," or had "legal authority to allow access to the property," and did list only "Florida Department of Parks and Recreation" as the only adjoining property owner. In addition, they implicitly represented entitlement to the exemptions and consent of use applied for.

CONCLUSIONS OF LAW

12. Since DEP seeks revocation of exemptions and consents of use issued to the Lays, DEP has the burden to prove legal grounds for revocation by preponderance of the evidence. See Balino v. Dept. of Health & Rehabilitative Servs., 348 So. 2d 349 (Fla. 1st DCA 1977).

13. DEP cites no statutory or even rule authority for revocation of a consent of use issued under Rules Chapter 18-21. (Rule citations are to the current Florida Administrative Code. Statute citations are to sections of the 2000 codification of Florida Statutes.) Contrast Walker v. Dept. of Business and Prof. Reg., 705 So. 2d 652 (Fla. 5th DCA 1998); Libby

Investigations v. Dept. of State, Div. of Licensing, 685 So. 2d 69 (Fla. 1st DCA 1986); Bill Salter Outdoor Advertising, Inc. v. Dept. of Transp., 492 So. 2d 408 (Fla. 1st DCA 1996); Farzad v. Dept. of Prof. Reg., 443 So. 2d 373 (Fla. 1st DCA 1983).

14. DEP's PRO implies that Rule 62-343.140(1) states grounds for revocation of the Lays' consents of use. It provides: "The Department shall revoke or suspend a permit when necessary to protect the public health, safety or welfare." But Rules Chapter 62-343 applies to environmental resource permits, not to consents of use of sovereign submerged lands. Although (in accordance with Sections 373.427 and 253.77(2) and Rules 62-110.106 and 62-312.065) DEP combined the processing and review of applications for both exemptions under Rules Chapter 62-343 and consents of use under Rules Chapter 18-21, this was done for administrative convenience and efficiency. It did not make exemption rules apply to consent of use applications (or vice versa).

15. Assuming Rule 62-343.140(1) applied and established the grounds for revocation of consents of use, DEP failed to prove that revocation of the Lays' consents of use is "necessary to protect the public health, safety or welfare."

16. In DEP v. Brotherton and Sportsman's Lodge Development Corp., DEP OGC Case No. 96-2581, DOAH Case No. 96-6070 1997 WL 594059, (Fla. Dept. Env. Prot. 1997), DEP addressed the

authority of an agency to modify final orders under somewhat analogous circumstances. There, DEP's predecessor agency, the Department of Environmental Regulation (DER), issued Brotherton an exemption to repair a dock. Brotherton claimed ownership based on a warranty deed to a condominium unit, together with an undivided share in the common elements of the Condominium, including "items of personal property . . . including the private dock located thereon." In giving this warranty deed, Brotherton's seller relied on a letter from the seller's predecessor in title that "[y]our boat dock will remain permanently assigned to your unit as a limited common element reserved for use by your unit" in consideration of execution of amended Condominium documents. In exempting the dock, DER notified Brotherton that "the exemption determination may be revoked 'if the basis for the exemption is determined to be materially incorrect.'" Id. at page 2. When the effectiveness of the conveyance of the dock to Brotherton was questioned, DEP sent Brotherton a letter revoking Brotherton's exemption. But in the Final Order, DEP rejected the letter based on the doctrine of "administrative finality."

17. In the Brotherton Final Order, DEP stated at pages 4-5:

> In the landmark case of Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966), the Florida Supreme Court recognized

that administrative agencies have inherent authority to modify prior final orders still under their control where it is demonstrated that such modification "is necessary in the public interest because of changed circumstances." Id. at 339. Nevertheless, in the Peoples Gas opinion, the court cited a line of cases holding that this inherent authority of an administrative agency to modify a prior final order is a limited one and concluded that:

> The effect of these decisions is that orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of courts. It is as essential with respect to orders of administrative bodies as with those of courts.

Id. at 339.

The court concluded in Peoples Gas that an attempted modification by the Public Service Commission of a final order four years after it was entered was improper based on the rule of finality of administrative orders. This rule of "administrative finality" was later reaffirmed in Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979). In the Austin Tupler case, the court held that to allow the Public Service Commission to revisit the issues decided in a final order entered two years earlier would "contravene the sound principles of finality enunciated in People's Gas." [FN9] Id. at 681.

In this administrative proceeding, the primary reason given for the Department's attempted revocation of DER's 1993 Letter of

Exemption No. 092309393 was that the information submitted by Brotherton in his 1993 application "has been determined to be materially incorrect" in that:

> In paragraph 14.A.1. of the application you state that you are the record owner or the record easement holder of the property. The Warranty Deed provided by you does not indicate evidence of the above. (DEP's Exhibit 4)

It is undisputed that Brotherton did represent in his 1993 exemption application form submitted to DER that he was "the record owner ... of the property on which the proposed project is to be undertaken, as described in the attached legal document." It is also undisputed that the attached legal document (copy of an executed and recorded warranty deed) purported to convey to Brotherton fee simple title to Condominium Unit No. 5, together with title to the dock in question as personal property. (DEP Exhibit 3, attachment "A"). The specific nature of the record ownership interest received by Brotherton in the upland property adjacent to the dock, however, is unclear from the face of the warranty deed attached to his application. [FN10]

Even assuming that the warranty deed attached to Brotherton's 1993 application did not substantiate that he had sufficient record ownership interest in the dock and adjacent uplands to be entitled to the requested regulatory exemption/consent of use determination, these purported property title defects were readily apparent on the face of this deed. [FN11] Thus, the record in this case does not demonstrate that the Department's attempted revocation of DER's Letter of Exemption No. 092309393 is based on critical newly-discovered evidence not included in Brotherton's 1993 exemption application package.

There are no allegations or proof in this proceeding that Brotherton willfully

> falsified any representations in the application forms and supporting documents filed with DER in 1993. Neither are there any allegations or proof that Brotherton willfully concealed from DER relevant information adverse to his exemption application. If there were allegations and proof in this case of such willful misconduct on the part of Brotherton, this may have been sufficient to support the propriety of the Department's preliminary action in 1996 seeking revocation of DER's 1993 regulatory exemption/consent of use determination.
>
> The Department's legal position throughout these proceedings implies that DER did not conduct an adequate review of Brotherton's application in 1993 with respect to his consent of use request. The Department's contention suggests that DER either overlooked or misconstrued the provisions of Rule 18-21.004(3)(b), Florida Administrative Code, in granting the consent of use to Brotherton. I decline to rule on the merits of such a proposition based on the "administrative finality" doctrine discussed above.

18. Comparing this case to the Brotherton case, DEP contends essentially that the Lays' applications were "materially incorrect." While the alleged defects in the applications were not "readily apparent on the face of" the applications, neither is there any evidence that the Lays "willfully falsified any representations in the application forms and supporting documents" or "willfully concealed from DEP relevant information adverse to [their] exemption application[s]." While the facts in this case are not identical to those in Brotherton, it is concluded that the consents of use

in this case, like the exemption in Brotherton, should not be revoked, based on the "administrative finality" doctrine discussed above.

19. Beyond the doctrine of "administrative finality," it is concluded that DEP did not prove that the representations in the Lays' applications were false. Under Florida law, "in the absence of a contrary showing," conveyance of Lots 16 and 17 included title to the centerline of the road east of the Lays' property, subject to the easement dedicated to Lee County by platting of the Cayo Costa Subdivision in the early 1910's; and, since the County either did not accept or has abandoned the road easement, the Lays own to the centerline of the road easement free and clear of any easement. See Smith v. Horn, 70 Fla. 484, 489, 70 So. 435, 436 (1915); Calvert v. Morgan, 436 So. 2d 314 (Fla. 1st DCA 1983). DEP did not prove that MHW is to the west of the centerline of the platted road easement at the point of the Lays' proposed dock.

20. As suggested by Smith v. Horn, it was possible for the conveyance of Lots 16 and 17 from the owner who platted the Cayo Costa Subdivision to have excluded title to the road easement (or to have retained a reversionary interest). If so, the Lays would not own to the centerline of the road easement. See Servando Bldg. Co. v. Zimmerman, 91 So. 2d 289, 291-292 (Fla. 1956); Peninsula Point, Inc. v. South Georgia Dairy Co-op, Inc.,

251 So. 2d 690, 692-693 (Fla. 1st DCA 1971). But DEP did not prove that the deeds to Lots 16 and 17 included such a provision. For that reason, DEP did not prove that the Lays do not own to the centerline of the platted road easement and did not prove any misrepresentations in the Lays' applications for consent of use.

21. Finally, in Bd. Of Trustees of Internal Improvement Trust Fund v. Barnett, 533 So. 2d 1202, 1206-1207 (Fla. 3d DCA 1988), the court approved a lower court conclusion of law rejecting a contention that "rights acquired from the State in its proprietary capacity may be revoked at any time before the holder changes his position in reliance on the right." DEP properly has not taken such a position in this case. (Nor did DEP prove that the Lays did not change position in reliance on the consents of use.)

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that DEP enter a final order: (1) disapproving DEP's notice dated January 18, 2001, of intent to revoke the Lays' two consents of use; and (2) dismissing this administrative proceeding in which DEP seeks revocation of its two consents of use.

DONE AND ENTERED this 14th day of August, 2001, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
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 14th day of August, 2001.

COPIES FURNISHED:

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

John and Janet Lay
3901 Southwest 27th Court
Cape Coral, Florida 33914

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

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

David B. Struhs, Secretary
Department of Environmental Protection
3900 Commonwealth Boulevard
The Douglas Building
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.