

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KEVIN SCULLY,)
)
 Petitioner,)
)
 vs.) Case No. 05-0058
)
 SAM PATTERSON and DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Notice was given, and on March 29, 2005, a final hearing was conducted by Charles A. Stampelos, Administrative Law Judge, by video teleconference with sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Kevin Scully, pro se
941 Brookdale Drive
Boynton Beach, Florida 33435

For Respondent: Sam Patterson, pro se
9449 Worswick Court
Wellington, Florida 33414

For the Department of Environmental Protection:

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

STATEMENT OF THE ISSUE

Whether Sam Patterson's proposed dock project is exempt from the need to obtain an Environmental Resource Permit (ERP) from the Department of Environmental Protection (Department) under Florida Administrative Code Rules 40E-4.051(3)(c) and (d).

PRELIMINARY STATEMENT

On or about September 3, 2004, Respondent, Sam Patterson (Mr. Patterson), filed an application requesting an ERP exemption to replace an existing five-foot by 21-foot (105-square feet) marginal dock in the same location, configuration, and dimensions as the existing dock. He also requested permission to install a five-foot by 16-foot (80-square feet) finger pier perpendicular to the existing marginal dock.

The Department reviewed the application and on October 13, 2004, advised Mr. Patterson, in part, that his project was exempt from the need to obtain an ERP under Florida Administrative Code Rules 40E-4.051(3)(c) and (d).

On or about December 17, 2004, Kevin Scully (Mr. Scully) filed an Amended Petition challenging the Department's preliminary agency action.

On January 7, 2005, the Department referred the matter to the Division of Administrative Hearings (DOAH) for the assignment of an administrative law judge. On February 7, 2005, this matter was set for a final hearing to commence on March 9,

2005. Subsequently, the case was continued for good cause shown and reset to commence on March 29, 2005, by video teleconference with sites in Tallahassee and West Palm Beach, Florida.

On March 24, 2005, the parties filed their Joint Pre-Hearing Stipulation. Also, on March 24, 2005, Mr. Scully's counsel filed a motion to withdraw, which was granted.

On March 25, 2005, the Department filed seven joint exhibits. During the final hearing, Joint Exhibits (JE) 1 through 7 were admitted in evidence without objection, with the caveat that Mr. Scully's Amended Petition (Joint Exhibit 5) contained allegations, which required proof.

The Department called Jennifer Smith, Department Environmental Specialist III, as a witness. Mr. Patterson testified in his own behalf and also called Charles Bell, a licensed marine contractor, as a witness. Mr. Scully testified in his own behalf and also offered the testimony (by telephone) of Muir C. "Mike" Ferguson, City Commissioner, City of Boynton Beach, and Ken Clark, a barber by profession and a boater for over 20 years.

On April 5, 2005, Mr. Scully filed a two-page letter as his proposed recommended order (PRO). On April 8, 2005, the Department filed a PRO. Mr. Patterson did not file a PRO. No transcript of the final hearing was filed.

FINDINGS OF FACT

The Parties

1. Mr. Scully resides at 941 Brookdale Drive, Boynton Beach, Florida, Lot 16, adjacent to and south-southeast of Mr. Patterson's residential property. The northern or rear portion of Mr. Scully's lot borders on an artificial canal that is designated a Class III water by Department rule. He does not have a dock per se; he moors his boat against and parallel to a narrow concrete area (and his lot line), separated by buffering material.

2. Mr. Patterson, the applicant, owns the property at 930 Brookdale Drive, Boynton Beach, Florida, Lot 15. Lot 15 is north-northwest and adjacent to Mr. Scully's property. This residential property is currently leased to others. The residential property (Lot 14) adjacent to and north-northeast of Mr. Patterson's lot is apparently owned by an individual named Meloche.

3. The Department has the jurisdiction to determine whether the proposed project is exempt from ERP requirements.

The Proposed Project

4. On or about September 13, 2004, Mr. Patterson filed an application requesting an exemption to replace an existing five-foot by 21-foot (105-square feet) marginal dock in the same location, configuration, and dimensions as the existing dock.

He also requested an exemption to install a five-foot by 16-foot (80-square feet) wooden finger pier extending perpendicular to and from the middle of the existing marginal dock.

5. As of the final hearing, the project has been revised such that the wooden finger pier will extend 11.8 feet (rather than 16 feet) and perpendicular from the middle of the marginal dock. Mr. Patterson changed the length of the finger pier to comply with City regulations, which are not at issue in this case.

6. The "Site Plan" is attached to the Department's Notice of Determination of Exemption. (JE 1). The "Site Plan" shows a one-story residence on Mr. Patterson's Lot 15. The front of the lot measures 100 feet, whereas the rear of the lot (that abuts the canal on the easternmost portion of the lot) is 50 feet in length from south to north. The seawall is one-and-one-half feet in width. The existing marginal dock abuts the seawall running south to north and is 21 feet long and five feet wide. Small concrete platforms abut the marginal dock on the south and north.

7. The Department reviewed the original application and on October 13, 2004, advised Mr. Patterson, in part, that his project was exempt from the need to obtain an ERP under Florida Administrative Code Rules 40E-4.051(3)(c) and (d). The

Department had not reviewed the change to the project prior to the final hearing. See Finding of Fact 5.

8. Lots 16, 15, and 14 are situated as a cul-de-sac (semi-circle) with the canal north of Lot 16, east of Lot 15, and south of Lot 14. Lot 14 is across the canal from Mr. Scully's Lot 16. There are five properties on each side of the canal, running west to east.

9. The artificial canal runs directly east from Mr. Patterson's property for an uncertain distance to the Intracoastal Waterway (ICW). Mr. Patterson's property (Lot 15) is the western end-point for this canal.

10. Mr. Patterson's eastern property line (fronting the canal) is 50 feet in width. However, the precise width of the canal between Lots 14 and 16 is unclear.

11. Ms. Smith reports (in her site inspection report of March 3, 2005 (JE 3)) that the canal is approximately 50 feet wide. Mr. Patterson testified that Karen Main with the City of Boynton Beach advised him that the consensus opinion of City employees reviewing the issue was that the canal measured 66 feet in width.

12. There appears to be some widening of the canal east of Mr. Patterson's property line and then the canal appears to straighten-out as it proceeds to the east to the ICW and past

the easterly property lines for Lots 14 and 16. See (JEs 1-site plan; 5-aerial).

13. The weight of the evidence indicates that the canal, between Lots 14 and 16, is approximately 60 to 66 feet wide. See, e.g., id.

14. In the past, the prior owner of Lot 15 (Mr. Patterson's property) moored a boat at and parallel to the marginal dock, which means that the bow, for example, faced Lot 14 and the stern faced Lot 16.

15. Mr. Patterson currently owns a 16-foot boat that he wants to moor at the marginal dock. However, he feels that it is unsafe to do so, particularly if Mr. Scully's boat drifts.

16. Meloche (Lot 14 to the north) has a fixed boatlift, which allows for the elevation of a boat out of the water, with the bow facing west toward and in front of the northern end of Mr. Patterson's seawall. (JE 4).

17. Mr. Scully moors his boat parallel to the shoreline of Lot 16 and perpendicular to Mr. Patterson's 50-foot eastern seawall and property line. (JEs 4 and 6).

18. Mr. Scully's seawall intersects Mr. Patterson's seawall such that when Mr. Scully's 22-foot boat is moored at his seawall, it is also in front of the southern end of Mr. Patterson's seawall. Id. When Mr. Scully's boat is tightly moored at his seawall, it does not interfere with or block Mr.

Patterson's marginal dock. (JE 6). However, when Mr. Scully's boat is loosely moored, it drifts toward the center of the canal in front of Mr. Patterson's marginal dock. (JE 4).

19. With no boat moored at the marginal dock, Mr. Scully is able to freely maneuver his boat to his seawall with limited "backing" of his boat required (stern first). With a boat consistently moored at Mr. Patterson's marginal dock, Mr. Scully would have to back into his area beside his seawall in order to avoid colliding with that boat.

20. Mr. Patterson's finger pier would enable him to safely moor a boat perpendicular to the marginal dock. Centering the finger pier at the marginal dock is likely to make it easier for Mr. Patterson and Mr. Scully to navigate to their respective mooring areas, depending on the size of the boats moored by Mr. Patterson and Mr. Scully. (The Department, in reviewing similar exemption requests, does not consider the type and size of the boat(s) to be moored at the proposed dock or adjacent mooring site.)

21. It is preferable for the boats to be moored, in this location, stern first, with the bow facing down the canal from the wake of the boats traveling in the ICW.

22. Centering the finger pier at the marginal dock and mooring Mr. Patterson's boat on the north side of the finger pier is likely to enable Meloche, Mr. Patterson, and Mr. Scully

to moor their boats parallel to each other and avoid collisions.¹ Placement of the finger pier at the northern end of the finger pier, while favored over the proposed location by Mr. Scully, is likely to interfere with Meloche's use of his property and boatlift.

23. With the finger pier centered on the marginal dock and a boat moored to the north, Mr. Scully can maneuver his boat to his seawall by "backing in" stern first. An experienced boater can accomplish this task in two to three maneuvers. Mr. Scully is an experienced boater and has lived on the canal for approximately eight years.

24. Shortening the finger pier from 16 feet to 11.8 feet will not affect Mr. Patterson's ability to safely moor a boat on the northern side of the finger pier.

The Challenge

25. Mr. Scully contends that the placement of the wooden finger pier and the mooring of a sizable boat on the proposed finger pier will interfere with his ability to navigate in and out of the canal in or around his property, and necessarily interfere with his ability to moor his boat adjacent to his property. He also contends that the marginal dock and the finger pier are two docks, not one.

Resolution of the Controversy

26. Replacement of the existing marginal dock will consist of replacing the decking and using the existing pilings. The existing marginal dock is currently functional.

27. Reconstruction of the marginal dock and construction of the finger pier will be done by a licensed marine contractor. The licensed marine contractor will use best management practices to avoid water quality problems in the canal during construction. Construction of the proposed project is not expected to adversely affect flood control or violate water quality standards.

28. The proposed project will not impede navigation. But see Endnote 1.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

30. This proceeding is intended to formulate final agency action, not to review action taken earlier and preliminarily by the Department. McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977).

31. Mr. Patterson has the burden to prove, by a preponderance of the evidence, that he is entitled to the

requested exemption. Department of Transportation v. J.W.C., Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

32. The Department is the agency responsible for administering the provisions of Chapter 373, Part IV, Florida Statutes, regarding activities in surface waters of the state that may or may not require an ERP.

33. Florida Administrative Code Rule 40E-4.051(3)(a) authorizes the Department to approve exemptions from ERP requirements for the "construction, replacement or repair of mooring pilings and dolphins associated with private docking facilities." In particular, an exemption may be approved for "[c]onstruction of private docks in artificially created waterways where construction will not violate water quality standards, impede navigation, or adversely affect flood control" and when replacement of the existing dock will require no fill material other than the piles used, the replaced dock is in the same location, configuration, and dimensions as the dock being replaced, and the existing dock is functional. Fla. Admin. Code R. 40E-4.051(3)(c) and (d)1.-3. Only one exempt dock may be allowed per parcel or lot where the shoreline length is less than 65 feet along the shoreline for the parcel or lot. Fla. Admin. Code R. 40E-4.051(3)(b)4.

34. "It has been established that a mere inconvenience, if one exists, does not constitute the type of navigational hazard

or adverse impact on navigation contemplated by" former Section 403.918(2)(a)3., Florida Statutes (1993), now Section 373.414(1)(a)3., Florida Statutes. See generally Berger v. Kline, Department of Environmental Protection, and Citrus County, Case No. 93-0264, 1994 WL 75879, at *6, *19 (DOAH Nov. 29, 1993; DEP Jan. 11, 1994). See also Archipelago Community Association, Inc. v. Raab and Department of Environmental Protection, Case No. 98-2430, 2000 WL 545612 (DOAH Mar. 1, 2000; DEP Apr. 13, 2000).

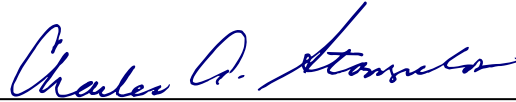
35. Mr. Patterson proved that the proposed finger pier would not impede navigation in and around the canal area near Lots 14, 15, and 16; that the proposed construction would not violate water quality standards or adversely affect flood control; and that the replacement of the existing dock satisfies the requirements of Florida Administrative Code Rule 40E-4.051(3)(d)1.-3. Mr. Patterson also proved that the marginal dock and the proposed finger pier will be one dock.

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 concluding that Mr. Patterson's proposed dock project, as revised, is exempt from the need to obtain an ERP.

DONE AND ENTERED this 14th day of April, 2005, in
Tallahassee, Leon County, Florida.



CHARLES A. STAMPELOS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of April, 2005.

ENDNOTE

^{1/} Mr. Patterson testified that he intends to moor one boat at the finger pier. Mr. Scully testified that Mr. Patterson told him that he intends to moor two boats at the finger pier. Mooring a boat on the south side of the finger pier may cause Mr. Scully difficulty and more than an inconvenience in docking his boat, depending on the width and length of the boat moored on the south side of the finger pier. Mr. Patterson should be bound by his representation and limited to mooring one boat on the north side of the finger pier.

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.