

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

FILED
2007 DEC 12 P 1:03
DIVISION OF
ADMINISTRATIVE
HEARINGS

SCOTT R. ROSENBLUM,

Petitioner,

vs.

**WAYNE ZIMMET and DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

Respondents.

OGC CASE NO. 06-1444
DOAH CASE NO. 06-2859

FINAL ORDER

On October 23, 2007, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order ("RO") to the Department of Environmental Protection ("DEP") in this administrative proceeding. The RO indicates that a copy was served to the counsel for Petitioner, Scott R. Rosenblum ("Rosenblum"). A copy was also served to counsel for Co-Respondent, Wayne Zimmet ("Zimmet"). A copy of the RO is attached hereto as Exhibit A. No Exceptions to the RO were filed by any of the parties. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

Both Wayne Zimmet and Scott Rosenblum own property in Tequesta, Florida, in a community known as North Passage. The properties, which share a common boundary, border a man-made navigation and drainage easement canal that terminates at its eastern end at Mr. Rosenblum's property. Mr. Zimmet's property is south of Mr. Rosenblum's property, along the same canal. There is an existing dock extending—

westward from Mr. Rosenblum's property into the canal. There are two wooden walkways leading to the existing dock: one from Mr. Rosenblum's property and one from Mr. Zimmet's property. There is a dispute between Mr. Zimmet and Mr. Rosenblum as to who is entitled to access and use the existing dock, in particular the south side of the existing dock. That dispute will be resolved in state circuit court. For purposes of this proceeding, the ALJ assumed that Mr. Rosenblum has the right to use the existing dock.

On May 25, 2006, Mr. Zimmet filed an application requesting an ERP exemption to install an eight-foot by twenty-foot (160-square feet) marginal dock with a two-pile elevator lift designed to accommodate his boat, which is approximately 24.5 feet long (22 feet at the waterline) and eight feet wide. The proposed dock would be centered along the waterfront of his property and would extend approximately four feet into the canal. The Department reviewed the application and on June 23, 2006, advised Mr. Zimmet, in part, that his project was exempt from the need to obtain an ERP under the private dock exemption found in Rule 40E-4.051(3)(c). This rule provides that an ERP is not needed for the construction of private docks in artificially created waterways where the construction will not violate water quality standards, impede navigation, or adversely affect flood control.

On July 10, 2006, Mr. Rosenblum filed a Request for Administrative Hearing challenging the Department's preliminary agency action. After a series of continuances, the hearing was held on September 6, 2007. At the hearing, the ALJ focused solely on whether the proposed dock would impede navigation.

RECOMMENDED ORDER

As stated above, the ALJ assumed, for the purposes of this proceeding, that Mr. Rosenblum has the right to use the existing dock; accordingly, the only question addressed in the RO is whether Mr. Zimmet's proposed boat dock and lift project qualifies for the ERP exemption found in Rule 40E-4.051(3)(c). Based on the evidence presented, the ALJ concluded that Mr. Zimmet failed to establish by a preponderance of the evidence that the proposed dock and lift would not "impede navigation" to and from the south side of the existing dock. Therefore, the ALJ found that he is not entitled to the private dock exemption.

In his findings, the ALJ noted that, while Mr. Rosenblum currently only uses a raft from the existing dock, he intends to purchase and use a boat in the future. The ALJ also found that large boats are common in the North Passage canal, and that a boat of 24.5 feet in length with a beam of 8 to 8.5 feet would barely fit alongside Mr. Zimmet's boat were it docked at the proposed dock or on the proposed lift. In addition, the RO states that there would not be a reasonable amount of clearance for navigating a large boat to or from the south side of the existing dock if Mr. Zimmet's boat were docked at the proposed dock or on the proposed lift. Similarly, if a boat were docked on the south side of the existing dock, Mr. Zimmet would be unable to use his proposed dock or lift. The ALJ did not find any evidence of an impediment to navigation to and from the north side of the existing dock.

Based on these findings, the ALJ concluded that Mr. Zimmet is not entitled to the ERP exemption for a private dock. While mere inconvenience is insufficient to constitute an impediment to navigation, the ALJ found that the proposed dock creates

more than a mere inconvenience and would, in fact, impede navigation in the North Canal. The RO further states that, because Mr. Zimmet applied for an exemption from an ERP, the Department would be unable to impose conditions that might prevent the proposed dock and lift from impeding navigation. The ALJ concluded, therefore, that the DEP should deny his application for an ERP exemption under 40E-4.051(3)(c), F.A.C.

CONCLUSION

Parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures, or in the ALJ's findings of fact, by filing exceptions to DOAH recommended orders. See Couch v. Comm'n on Ethics, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); Florida Dep't of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Here, the ALJ concluded in the RO that, based on a preponderance of the evidence, Mr. Zimmet's proposed boat and lift project will impede navigation, and therefore he is not entitled to use the ERP exemption under 40E-4.051(3)(c), F.A.C. Mr. Zimmet filed no Exceptions to the RO; he did not object either to the ALJ's findings of fact or to the DOAH hearing procedures.

Having considered the applicable law in light of the uncontested findings of fact set forth in the RO, and being otherwise duly advised, it is ORDERED THAT:

A. The Recommended Order (Exhibit A) is adopted in its entirety and incorporated herein by reference.

B. Mr. Zimmet is not entitled to the ERP exemption found at 40E-4.051(3)(c) of the Florida Administrative Code for his proposed boat and lift.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 11th day of December, 2007, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



MICHAEL W. SOLE
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.



CLERK

12/11/07
DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by

United States Postal Service to:

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Claudia Llado, Clerk and
J. Lawrence Johnston, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Nona R. Schaffner, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 11th day of December, 2007.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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