

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCOTT R. ROSENBLUM,)
)
 Petitioner,)
)
 vs.) Case No. 06-2859
)
 WAYNE ZIMMET and DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Notice was given, and on September 6, 2007, a final hearing was conducted by J. Lawrence Johnston, Administrative Law Judge, in Stuart, Florida.

APPEARANCES

For Petitioner: Jacob Eli Ensor, Esquire
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For Applicant: James D. Ryan, Esquire
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For the Department of Environmental Protection:

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STATEMENT OF THE ISSUE

Whether Wayne Zimmet's proposed single-family boat dock and lift project is exempt from the need to obtain an Environmental Resource Permit (ERP) from the Department of Environmental Protection (Department) under Florida Administrative Code Rule 40E-4.051(3)(c).¹

PRELIMINARY STATEMENT

On or about May 25, 2006, Respondent, Wayne 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 to accommodate his boat, which is approximately 24.5 feet long (22 feet at the waterline) and eight-feet wide.

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 Rule 40E-4.051(3)(c).

On or about July 10, 2006, Scott R. Rosenblum filed a Request for Administrative Hearing challenging the Department's preliminary agency action.

On August 8, 2006, the Department referred the matter to the Division of Administrative Hearings (DOAH) for the assignment of an administrative law judge. On August 25, 2006, this matter was set for a final hearing in Stuart, Florida, to commence on October 30, 2006. Subsequently, the case was

continued three times for good cause shown and eventually was rescheduled to be heard on September 6-7, 2007.

On August 20, 2007, Mr. Rosenblum filed a Motion for Continuance on the ground that the Department had no jurisdiction to resolve real property disputes as to who has the right to use an existing dock, and particularly the south side of the existing dock, located roughly between the adjacent properties owned by Messrs. Rosenblum and Zimmet. The continuance was opposed by Mr. Zimmet and, after a telephonic hearing, denied with the understanding that the real property disputes would be determined in a pending action between the parties in state circuit court, since the circuit court has the exclusive jurisdiction to determine those issues, and not in this proceeding, for purposes of which it would be presumed that Mr. Rosenblum has the right to use the existing dock. As a result, the sole issue for determination in this proceeding is whether the proposed dock will "impede navigation."

On September 4, 2007, the parties filed a Pre-Hearing Stipulation. At the outset of the hearing, Department Exhibits 1 through 6 were received in evidence in accordance with the Pre-Hearing Stipulation. In addition, the Motion for Official Recognition of a Florida Statute and applicable Rules, filed by the Department on January 19, 2007, was granted. Then counsel for Mr. Zimmet called: Frederick Vogel of Vogel Marine;

Mr. Zimmet; Jason Storrs, the Department reviewer; Mr. Rosenblum as an adverse party witness; and Thomas Danti, Dean of the Chapman School of Seamanship, who actually was Mr. Rosenblum's navigation expert witness. Counsel for Mr. Zimmet having called all the witnesses, the other parties relied on their cross-examination, which in some cases was allowed to exceed direct without objection. Mr. Rosenblum added one exhibit (his Exhibit 1, also erroneously referred to as his Exhibit 2) to the evidence presented in the case.

After the presentation of the evidence, and oral closing statements by counsel for Mr. Zimmet and Mr. Rosenblum, who ordered the preparation of a Transcript of the hearing, the parties were given ten days from the filing of the Transcript to file proposed recommended orders. The Transcript was filed on October 5, 2007, and the parties' timely post-hearing submissions have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Both Wayne Zimmet and Scott Rosenblum own property in Tequesta, Florida, in a community known as North Passage, which has a man-made navigation and drainage easement canal that terminates at its eastern end at Mr. Rosenblum's property, which is Lot 74, at 8738 Riverfront Terrace. Mr. Zimmet's property, which is Lot 75, at 8750 Riverfront Terrace, is south of the

eastern terminus of the canal. The Rosenblum and Zimmet properties are adjacent and share a common boundary.

2. There is an existing dock extending from Mr. Rosenblum's property into the canal. The existing dock is perpendicular to, and extends west from the middle of, the shore of the eastern terminus of the canal. There is a wooden walkway leading from the residence on Mr. Rosenblum's property to the existing dock. However, there also has been a wooden walkway leading from Mr. Zimmet's property to the existing dock. As indicated in the Preliminary Statement, there is a dispute between Mr. Zimmet and Mr. Rosenblum as to who is entitled to access and use the existing dock--and in particular the south side of the existing dock. That dispute will be resolved in state circuit court.² For purposes of this proceeding, it will be assumed that Mr. Rosenblum has the right to use the existing dock.

3. On or about 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 to designed to accommodate his boat, which is approximately 24.5 feet long (22 feet at the waterline) and eight feet wide. According to documentation submitted with the application, the proposed dock would be centered along the waterfront of his property and extend approximately four feet

into the canal. The proposed boat lift would be skewed toward the western end of the proposed marginal dock with the intent being to dock his boat with the bow facing the west so that proposed dock could be used to enter and load the boat from the stern. This positioning of the proposed lift and boat at the proposed dock would skew a boat on the lift at the proposed dock about three feet to the west, away from the existing dock.

4. Based on the evidence, it is found that Mr. Zimmet did not prove by a preponderance of the evidence that his proposed boat dock and lift, even if skewed to the west as indicated in the application drawings, would not "impede navigation" to and from the south side of the existing dock. (Otherwise, Mr. Zimmet's proposed dock and lift would not "impede navigation" in the canal.) This impediment to navigation to and from the south side of the existing dock is not a mere inconvenience. Although Mr. Rosenblum now only owns and uses a raft at the existing dock, he testified that he plans on purchasing and using a boat. Boats in the range of approximately 24.5 feet in length with a beam of 8 to 8.5 feet are common in the North Passage canal. A boat of that size docked at the south side of the existing dock would barely fit alongside Mr. Zimmet's boat, whether docked or on the lift, and there would not be a reasonable amount of clearance for navigating a boat of that size commonly 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. (Likewise, if a boat of that size were docked on the south side of the existing dock, there would not be a reasonable amount of clearance for Mr. Zimmet to use his proposed dock and lift.)

5. There was no evidence of any impediment to navigation to and from the north side of the existing dock.

CONCLUSIONS OF LAW

6. 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. (2006).

7. 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).

8. Mr. Zimmet 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).

9. The Department is the agency responsible for administering the provisions of Chapter 373, Part IV, Florida Statutes, (2006), regarding activities in surface waters of the state that may or may not require an ERP.

10. 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." Fla. Admin. Code R. 40E-4.051(3)(c).

11. "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), which became Section 373.414(1)(a)3., Florida Statutes (2006). See generally Berger v. Kline, Department of Environmental Regulation and Citrus County, Case No. 93-0264, 1993 Fla. Div. Adm. Hear. LEXIS 5536, at *25-6 (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 Fla. ENV LEXIS 97 (DOAH Mar. 1, 2000; DEP Apr. 13, 2000). However, as found, the proposed dock's impediment to navigation to and from the south side of the existing dock would not be a mere inconvenience.

12. Since this case is on an application for an exemption, conditions that might prevent the proposed dock and lift from impeding navigation cannot be imposed. See Scully v. Patterson and Dept. of Environmental Protection, DEP Case No. 04-1799,

DOAH Case No. 05-0058, 2005 Fla. Div. Adm. Hear. LEXIS 948 (DEP May 20, 2005; DOAH Apr. 14, 2005)(Final Order, on DOAH website, rejects, as unauthorized in exemption case, ALJ's suggestion to limit applicant to use of one side of dock). See also Castoro, et al. v. Palmer and Dept. of Environmental Protection, DEP Case No. 96-346, DOAH Case Nos. 96-0736 and 96-5879, 1998 Fla. ENV LEXIS 303 (DEP Oct. 15, 1998; DOAH Sept. 1, 1998)(similarly, noticed general permit is not "issued," since it is established by rule, but rather its use is authorized).

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, absent a circuit court determination that Mr. Rosenblum does not have the right to access and use the south side of the existing dock, Mr. Zimmet's proposed dock and lift project is not exempt from the need to obtain an ERP.

DONE AND ENTERED this 23rd day of October, 2007, in
Tallahassee, Leon County, Florida.

S

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of October, 2007.

ENDNOTES

^{1/} All rule citations are to the officially recognized version of the Florida Administrative Code (2006).

^{2/} Based on Petitioner's Exhibit 1, the wooden walkway from Mr. Zimmet's property has been removed, but there was no evidence as to the circumstances of its removal, which presumably would be a matter more properly considered in the pending circuit court case referred to in the Preliminary Statement.

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.