

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN WOOLSHLAGER,)	
)	
Petitioner,)	
)	
vs.)	Case No. 06-3296
)	
KEITH ROCKMAN and DEPARTMENT)	
OF ENVIRONMENTAL PROTECTION,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the
Division of Administrative Hearings by its assigned
Administrative Law Judge, Donald R. Alexander, on March 20,
2007, in Shalimar, Florida.

APPEARANCES

For Petitioner:	John N. C. Ledbetter, Esquire 4641 Gulfstarr Drive Suite 102 Destin, Florida 32541-5324
For Respondent: (Rockman)	Michael William Mead, Esquire John S. Mead, Esquire Michael Wm Mead, P.A. Post Office Drawer 1329 Fort Walton Beach, Florida 32549-1329
For Respondent: (Department)	Nona R. Schaffner, Esquire Amanda G. Bush, Esquire Department of Environmental Protection 3900 Commonwealth Boulevard Mail Station 35 Tallahassee, Florida 32399-3000

ISSUES

The issues are whether Keith Rockman's construction of a dock and other structures on Choctawhatchee Bay in Fort Walton Beach, Florida, is exempt from Wetland Resource Permit requirements, and whether authorization to use sovereign submerged lands for the project should be given.

BACKGROUND

This matter began on January 31, 2006, when Respondent, Department of Environmental Protection (Department), issued a letter advising Mr. Rockman that his proposed construction of a platform, two access piers, and fourteen mooring pilings in Choctawhatchee Bay in Fort Walton Beach, Florida, was exempt from Department permit requirements. The letter also constituted "authorization to use sovereign submerged land for the construction of [his] project."

On March 17, 2006, Petitioner, John Woolshlager, who lives next door to Mr. Rockman, filed a letter requesting a hearing to contest the determination that the activity was exempt from permitting requirements and that authorization to use sovereign submerged lands should be given. The letter was also filed on behalf of another neighbor, Charles A. Kennedy. On June 27, 2006, the Department issued an Order Dismissing Petition with Leave to Amend. In doing so, the Order struck a riparian

boundary line claim included in the letter on the ground such a claim could only be prosecuted in the circuit court.

On July 11, 2006, Mr. Woolshlager (but not Mr. Kennedy) filed a second letter which was treated as an Amended Petition. (It was learned at hearing that Mr. Kennedy no longer owns the adjacent property.) In that letter, he raised two grounds for reversing the Department's action, both found in Florida Administrative Code Rule 18-21.004(7), which contains general conditions for authorizations to use sovereign submerged lands.

The matter was forwarded by the Department to the Division of Administrative Hearings on September 1, 2006, with a request that an administrative law judge be assigned to conduct a hearing.

By Notice of Hearing dated September 14, 2006, the matter was scheduled for final hearing on January 9 and 10, 2007, in Fort Walton Beach, Florida. Venue was changed to Shalimar, Florida, and the matter was later continued to February 1, 2007, and then again to March 20, 2007, at the same location.

A status conference was held on January 5, 2007, at which time the undersigned ruled that only one issue in the Amended Petition required adjudication: whether the proposed structure or activities will create a navigation hazard within the meaning of Florida Administrative Code Rule 18-21.004(7)(g). Also, the parties agreed to the admission of the Department's permit file

as an exhibit at hearing. This ruling and agreement are embodied in an Order dated January 24, 2007.

At the final hearing, Petitioner testified on his own behalf. The Department presented the testimony of Diana Athnos, an Environmental Manager in the Department's Northwest District Office in Pensacola. Also, it offered Department Composite Exhibits 1 and 2, which were received in evidence. Mr. Rockman testified on his own behalf and presented the testimony of Michael Imm, who is licensed to pilot 100-ton vessels.

The Transcript of the hearing was filed on April 9, 2007. Proposed Findings of Fact and Conclusions of Law were filed by Mr. Rockman and the Department on April 18 and 19, 2007, respectively, and they have been considered in the preparation of this Recommended Order. None were filed by Petitioner.

FINDINGS OF FACT

Based on the evidence presented by the parties, the following findings of fact are made:

1. On December 19, 2005, Mr. Rockman, who lives at 325 Brooks Street, Southeast, Fort Walton Beach, Florida, filed an application with the Department's Northwest District Office in Pensacola requesting authorization to construct a platform seven feet wide by eight feet long; an access pier three feet long; another access pier four feet wide by forty-five feet long; four mooring pilings outside the slip; and ten mooring pilings inside

the proposed slip, totaling 371 square feet. The application indicated that the proposed construction activities would take place in the Choctawhatchee Bay, a Class III water of the State, on which Mr. Rockman's property fronts. (This waterbody is more commonly known as the Santa Rosa Sound or the Intracoastal Waterway.) The property already had an existing 25-foot dock when Mr. Rockman purchased the property sometime in 2005; however, because Mr. Rockman wishes to dock a larger boat than the prior owner, he has requested authorization to build the structures in issue here.

2. Based upon the information supplied by the applicant, Diana Athnos, an Environmental Manager with the Northwest District Office, advised Mr. Rockman by letter dated January 31, 2006, that the Department had "determined that [his] project is exempted from [the Department's] Wetland Resource Permit requirements by Rule 62-312.050(1)(d), Florida Administrative Code." The letter also stated that the "letter is your authorization to use sovereign submerged land (if applicable) for the construction of your project, as required by Chapter 253.77, Florida Statutes and Chapter 18-21, F.A.C." After Department approval was obtained, Mr. Rockman completed construction of the project.

3. Mr. Rockman elected not to publish notice of the Department's decision or provide notice by certified mail to

specific individuals. Therefore, third parties were not barred from challenging the Department's decision until after they received actual notice. Petitioner, who lives next door to Mr. Rockman, learned about the Department's decision in a telephone call with the Northwest District Office on March 8, 2006. The papers filed in this case indicate that Petitioner and other neighbors had actually observed construction activities on Mr. Rockman's property in November 2005 and had filed complaints with the Department regarding these unauthorized activities. These complaints evidently led to the filing of an application by Mr. Rockman.

4. On March 17, 2006, Petitioner, who resides at 328 Brooks Street, Southeast, Fort Walton Beach, and has 50 feet of frontage on the water with a dock extending into those waters, filed a letter with the Department, which was treated as a Petition challenging the Department's earlier decision. This Petition was later dismissed by the Department on the ground it raised claims concerning Petitioner's riparian rights, a matter beyond the Department's jurisdiction. Petitioner then filed an Amended Petition on July 11, 2006, in which he again contended that his riparian rights would be severely restricted by the proposed activities, and that the dock would create a navigational hazard. Although Florida Administrative Code Rule 62-312.050(1)(d)3. requires that a project not "create a

navigational hazard" in order to be exempt from permitting requirements, Petitioner opted to base his claims on two provisions in Florida Administrative Code Rule 18-21.004(7), which contains the general conditions for authorizations to use sovereign submerged lands. The riparian rights issue was again excluded from consideration at a status conference held on January 5, 2007. The parties advise that this issue is now being pursued in a separate action in circuit court.

5. Through the introduction into evidence of its complete permit file as Department Composite Exhibit 1, the Department established that the proposed activities are exempt from permitting requirements under Florida Administrative Code Rule 62-312.050(1)(d). More specifically, the activity will take place in waters which are not located in Outstanding Florida Waters; the structures are less than 1,000 square feet of surface area over the landward extent of waters of the State; they will be used for recreational purposes; they will be constructed on pilings; they will not substantially impede the flow of water or create a navigational hazard; and the structure is the sole dock constructed pursuant to the exemption as measured along the shoreline for a minimum distance of 65 feet.

6. The dock and associated structures and pilings will be constructed over sovereign submerged lands owned by the State of Florida. Under Florida Administrative Code Rule 18-21.005(1),

which specifies the forms of authorization for consent to use sovereign submerged lands, "no application or written authorization is required for an activity that is exempt from the requirements of obtaining a permit," so long as certain conditions are met, including those found in Florida Administrative Code Rules 18-21.004(7). See Fla. Admin. Code R. 18-21.005(1)(b). The only relevant condition raised in the Amended Petition is whether or not the "[s]tructures or activities shall . . . create a navigational hazard." Fla. Admin. Code R. 18-21.004(7)(g). In construing this rule, and the similar requirement in Florida Administrative Code Rule 62-312.050(1)(d)3., the Department considers whether the structures will create a navigational hazard for boaters on the Intracoastal Waterway, as well as the owners of property who reside on either side of Mr. Rockman.

7. In his Amended Petition, Mr. Woolshlager contended that the proposed structures or activities will create a navigational hazard when he accesses the dock in front of his property. As clarified at hearing, Petitioner does not dispute that he (or any "good boat driver") has adequate ingress and egress for his smaller boat, even with the larger dock on Mr. Rockman's property. Indeed, the record shows that he has been observed leaving his dock and accessing the Intracoastal Waterway. However, Petitioner indicated that if he should die, his wife

intends to sell the property. If the new purchaser desires to dock a larger boat, he fears that there will not be sufficient room to do so, and the value of his property will be diminished.

8. Through testimony from a licensed boat captain, it was established that Mr. Rockman's dock does not create a navigational hazard for boaters in the Intracoastal Waterway whose boat channel lies at least 600 feet or so from the shoreline, or for property owners on either side of the applicant's property. Although Petitioner cannot dock a larger boat than he now has (a 21-foot boat), this is because he needs to dredge out the area where his existing dock is built and reconfigure its shape. (Mr. Woolshlager agreed that his dock actually encroaches a few feet onto Mr. Rockman's property; however, Mr. Woolshlager advises that the prior owner (who sold the property to Mr. Rockman) agreed to this encroachment when he purchased the property.) Therefore, all criteria have been satisfied.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over this matter pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).

10. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. See, e.g., Balino v. Department of Health & Rehabilitative Servs.,

348 So. 2d 349, 350 (Fla. 1st DCA 1977). Therefore, Mr. Rockman has the burden of proving by a preponderance of the evidence that the proposed activity is exempt from Department permitting requirements and that authorization to construct the project on sovereign submerged lands is appropriate.

11. Florida Administrative Code Rule 62-312.050(1)(d) provides that no permit shall be required for the following type of projects:

(d) The installation of private docks 500 square feet or less of surface area over the landward extent of waters of the State or 1000 square feet or less of surface area over the landward extent of waters of the State for docks which are not located in Outstanding Florida Waters and any of which:

1. is used for recreational, non-commercial activities, associated with the mooring or storage of boats and boat paraphernalia; and

2. is constructed or held in place by pilings, including floating docks, so as not to involve filling or dredging other than that necessary to install the pilings; and

3. does not substantially impede the flow of water or create a navigational hazard; and

4. is the sole dock constructed pursuant to this exemption as measured along shoreline for a minimum distance of 65 feet, unless the parcel of land or individual lot as platted is less than 65 feet in length along the shoreline, in which case there may be one exempt dock allowed per parcel or lot. For the purposes of this rule, multi-family living complexes and other types of complexes or facilities associated with the

proposed private dock shall be treated as one parcel of property regardless of the legal division of ownership or control of the associated property. Construction of a private dock under this exemption does not require the Department to issue a subsequent permit to construct a channel to provide navigational access to the dock. Activities associated with a private dock shall include the construction of structures attached to the pier which are only suitable for the mooring or storage of boats (i.e. boatlifts).

12. This portion of the application is not in dispute, and the evidence shows that the proposed construction is exempt from Department permitting requirements. Even if the Amended Petition is construed to include a contention that the proposed activities create a navigational hazard within the meaning of subparagraph (1)(d)3. of the foregoing rule, for the reasons stated below, this part of the rule has been satisfied.

13. Because the Department is authorizing activities on sovereign submerged lands, the general conditions for authorizations under Florida Administrative Code Rule 18-21.004 come into play. See Fla. Admin. Code R. 18-21.005(1)(b)4.(in order to obtain authorization, "the activity must . . . [c]omply with the provisions of . . . subsections 18-21.004(6) and (7)"). Subsections (7)(f) and (g) of that rule are pertinent here, having been raised by Mr. Woolshlager in his Amended Petition, and require that all authorizations granted by rule or in writing shall be subject to the following conditions:

(f) Structures or activities shall not unreasonably interfere with riparian rights. When a court of competent jurisdiction determines that riparian rights have been unlawfully affected, the structure or activity shall be modified in accordance with the court's decision.

(g) Structures or activities shall not create a navigational hazard.

14. Because the first ground involves property rights that can only be resolved in circuit court, the navigation claim is the only issue requiring adjudication. See § 26.012(2)(g), Fla. Stat. (the circuit court has exclusive jurisdiction in "all actions involving the title and boundaries of real property"); Board of Trustees of the Internal Improvement Trust Fund v. Board of Professional Land Surveyors, 566 So. 2d 1358, 1361 (Fla. 1st DCA 1990)(holding that agency could not establish or apply an administrative rule to determine the ordinary high water line because "the determination of rights of parties to a riparian boundary dispute is instead a matter subject ultimately to judicial resolution under all applicable law").

15. As to the second issue, the preponderance of the evidence supports a conclusion that Mr. Rockman's project will not create a navigational hazard. In reaching this conclusion, it is noted that mere inconvenience does not constitute the type of navigational hazard contemplated by the rule. See Scully v. Patterson and Department of Environmental Protection, DOAH Case

No. 05-0058 (DOAH April 14, 2005, DEP May 23, 2005), 2005 Fla. Div. Adm. Hear. LEXIS 948 at *12, and cases cited therein.

While the project may create some inconvenience, or cause Petitioner to be more cautious during ingress and egress from his dock, the project will not create a navigational hazard.

16. In summary, Mr. Rockman has demonstrated by a preponderance of the evidence that his project is exempt from Department permitting requirements and that he meets the conditions for authorization to use state-owned submerged lands.

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 granting Mr. Rockman's application for an exemption from permitting requirements and authorization to use state-owned submerged lands.

DONE AND ENTERED this 7th day of May, 2007, in Tallahassee,
Leon County, Florida.

S

DONALD R. ALEXANDER
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 7th day of May, 2007.

COPIES FURNISHED:

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

John N. C. Ledbetter, Esquire
4641 Gulfstarr Drive
Suite 102
Destin, Florida 32541-5324

Nona R. Schaffner, Esquire
Amanda G. Bush, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

Michael William Mead, Esquire
John S. Mead, Esquire
Michael Wm Mead, P.A.
Post Office Drawer 1329
Fort Walton Beach, Florida 32549-1329

Gregory M. Munson, General Counsel
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

Michael W. Sole, Secretary
Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

NOTICE OF RIGHT TO FILE EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.