

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PETER J. PEDICINI,)
)
 Petitioner,)
)
 vs.) Case No. 07-4116
)
 STUART YACHT CORPORATION and)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER OF DISMISSAL

A hearing in this case was held on December 19, 2007, in Stuart, Florida, before Bram D. E. Canter, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Guy Bennett Rubin, Esquire
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For Respondents: Paul B. Erickson, Esquire
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ISSUES

The issues for determination in this case are whether Petitioner has standing to bring this action and, if so, whether Respondent Stuart Yacht Corporation is entitled to the General Permit which the Department of Environmental Protection (Department) intends to issue.

PRELIMINARY STATEMENT

On August 14, 2007, the Department issued a Notice of Determination of Qualification for a Noticed General Permit to Stuart Yacht Corporation to remove an existing dock and to construct a new dock in a manmade canal connected to the South Fork of the St. Lucie River in Stuart, Martin County, Florida. A timely petition challenging the proposed agency action was filed by Petitioner. The Department referred the matter to DOAH to conduct an evidentiary hearing. In referring the matter to DOAH, the Department expressly reserved its right to object to Petitioner's standing to initiate this proceeding.

The Department subsequently filed a motion to dismiss the petition on the ground that Petitioner lacked standing. Stuart Yacht Corporation joined in the motion to dismiss. In its motion, the Department argued that the ruling of the circuit court for Martin County in Stuart Yacht Corporation v. Peter Pedicini, Case No. 430025CA630 (October 10, 2007), that Mr. Pedicini had no riparian rights associated with the manmade

canal, was dispositive on the issue of Petitioner's standing in this administrative proceeding. The Administrative Law Judge (ALJ) denied the motion to dismiss, but noted that the denial of the motion did not affect the requirement that Petitioner affirmatively prove his standing at the final hearing.

On December 11, 2007, Petitioner moved for a continuance of the final hearing based on alleged problems associated with the deposition of certain expert witnesses of Stuart Yacht Corporation and Petitioner's inability to review certain Department exhibits. Because Petitioner's grounds for a continuance were not related to the standing issue, the ALJ denied the motion for continuance, but informed the parties in the Order Denying Continuance that the subject matter of the hearing on December 19, 2007, would be exclusively whether Petitioner has standing.

At the hearing, Petitioner presented the testimony of Peter Pedicini and Wayne Dube. Petitioner's Exhibits 1, 2, 3, and 5 were received into evidence. Stuart Yacht Corporation and the Department presented no witness testimony or exhibits. The Order Determining Riparian Rights that was issued by the circuit court was officially recognized. The ALJ informed the parties at the conclusion of the hearing that a ruling on Petitioner's standing would be made without post-hearing submittals from the

parties. The one-volume Transcript of the final hearing was filed with DOAH on January 31, 2008.

FINDINGS OF FACT

1. Petitioner owns Lot 4 in St. Lucie Settlement, a subdivision in Stuart, Florida. The subdivision has one border along the South Fork of the St. Lucie River. The subdivision has a finger fill that extends to the South Fork with canals on both sides. There are four lots on the finger fill, Lots 1 through 4 of the subdivision. Lot 4 is farthest from the river.

2. On the north side of Petitioner's property he has a dock where he keeps a boat.

3. The dispute in this case involves the canal on the south side of Petitioner's property. All references to "the canal" hereafter, unless otherwise noted, will be to the canal on the south side of Lot 4.

4. Between Lots 2, 3, and 4 and the canal is a road which provides access to the lots on the finger fill. Between the road and the canal is a narrow strip of land. Petitioner owns this narrow strip of land where it corresponds with his lot lines. In other words, the southern boundary of his Lot 4 abuts the canal. However, because the canal is artificial, having been created by dredging, Petitioner has no riparian rights associated with the canal. That was the holding of the circuit

court for Martin County in the litigation between Stuart Yacht Corporation and Petitioner.

5. It was also established in the circuit court litigation that St. Lucie Settlement, Inc., which is the homeowner's association for the subdivision, owns the northern half of the canal and Stuart Yacht Corporation owns the southern half of the canal.

6. No subdivision documents were presented to show the extent of rights granted to homeowners within St. Lucie Settlement related to the construction of docks or other uses of water bottoms that are included within the subdivision.

7. Petitioner testified that he terminated his membership in the homeowners association three-and-a-half years ago.

8. Stuart Yacht Corporation owns and operates a marina on the south side of the canal which includes docks over the water. At some point in the past, but before Petitioner purchased Lot 4 in 1995, Stuart Yacht Corporation constructed a dock along the north side of the canal, over the water bottom owned by St. Lucie Settlement, Inc. The dock along the north side of the canal has been used for mooring large yachts.

9. The portion of the dock that ran along the boundary of Lot 4 was recently removed by Stuart Yacht Corporation following the rulings in the circuit court. The balance of the dock along

the north side of the canal would be removed as a part of the proposed permit that Petitioner has challenged.

10. In addition to removing the dock along the north side of the canal, the proposed permit authorizes Stuart Yacht Corporation to construct a new dock that is four feet wide and runs 150 feet along the property boundary in the center of the canal. No part of the proposed new dock would be on the property of St. Lucie Settlement, Inc.

11. St. Lucie Settlement, Inc., did not challenge the proposed permit.

12. In his petition for hearing, Petitioner alleged that the proposed new dock would cause the following injuries to his interests:

a. interference with ingress and egress to Petitioner's shoreline;

b. interference with Petitioner's desire to obtain a permit in the future to construct a dock or to "harden" the southern shoreline; and

c. interference with Petitioner's riparian rights.

13. Petitioner's testimony about his past use of the canal was inconsistent. He said he moored his boat in the canal once in 1995. He said he boated into the canal to fish on several occasions. He said that (at least twice) when he attempted to enter the canal by boat, he was denied access by representatives

of Stuart Yacht Corporation. However, in a deposition taken before the hearing, Petitioner said he had never attempted to use the canal.

14. The only testimony presented by Petitioner to support his claim that the proposed permit would interfere with his navigation, fishing, and desire to obtain a dock permit in the canal was the following:

I couldn't get a boat in there with that proposed dock in the center line of the canal right on their side of the canal. It would be 150 feet long. It would be a huge Wall of China. My neighbor and I couldn't get to our shoreline.

15. The evidence presented was insufficient to prove that Petitioner would be unable to navigate into the canal in a small boat or to fish in the canal if the proposed dock is constructed. The evidence was also insufficient to prove that Petitioner would be unable to construct any kind of dock for any kind of watercraft if the proposed dock is constructed.

CONCLUSIONS OF LAW

16. DOAH has jurisdiction over the parties and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).

17. Subsection 120.569(1), Florida Statutes, provides that the right to participate in administrative proceedings extends

to any person whose substantial interests will be affected by proposed agency action.

18. The most informative case on the subject of the rights of adjacent landowners to make use of artificial water bodies is Publix v. Pearson, 315 So.2d 98 (Fla. 2d DCA 1971). The holding in Publix was that persons whose property abutted an artificial lake had no riparian rights and could not enjoin the owner of a portion of the lake bottom from filling its lake bottom to construct a shopping center. It was acknowledged by the court that the filling would "cut off access to and use of the surface waters of a portion of the lake." Id. at 99. Nevertheless, the court held that the appellees' interest in using the entire lake could not prevent the owner of the bottom from exercising control of its property.

19. The Publix holding requires a conclusion that Petitioner cannot complain of an injury to his interest in preserving the opportunity to navigate over the bottom of the canal owned by Stuart Yacht Corporation because that is not a legally cognizable interest.

20. Petitioner failed to allege or show that he would not be able navigate into the canal and fish from a small boat if the proposed permit is issued. The evidence presented indicates otherwise. Petitioner did not allege that he cannot access the St. Lucie River. Even riparian landowners with riparian rights

do not have rights to multiple docks. The riparian right to "wharf out" is a qualified right to facilitate access to navigable waters. Thiesen v. Gulf, F. & A. R. Co., 48 So. 491 (Fla. 1918).

21. Petitioner's interest in constructing a dock in the future is speculative. Moreover, Petitioner did not allege or prove that it would be impossible to build any kind of dock for any kind of watercraft. Petitioner's claims appear to be based on the presumption that he has the right to sail a large yacht into the canal and dock it at his shoreline. However, even the riparian right to build a dock does not include the right to build a dock of a particular type or which would accommodate a vessel of a particular size.

22. Petitioner presented no evidence to support his claim that the proposed permit could prevent him from hardening his shoreline.

23. Because the evidence presented was insufficient to prove that Petitioner has a substantial interest that could be unreasonably interfered with if the proposed permit were issued, Petitioner failed to demonstrate his standing.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department

1. dismiss the petition for hearing based on Petitioner's failure to prove standing, and

2. issue the proposed permit to Stuart Yacht Corporation.

DONE AND ENTERED this 20th day of February, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 20th day of February, 2008.

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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.