

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GOOSE BAYOU HOMEOWNER'S)
ASSOCIATION,)
)
Petitioner,)
)
vs.) Case No. 09-1725
)
DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On July 29, 2009, a final administrative hearing in this case was held by video teleconference in Tallahassee and Panama City before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Bill Britton, Qualified Representative
Goose Bayou Homeowner's Association
4002 Valencia Court
Panama City, Florida 32405-3221

For Respondent: Brynna J. Ross, Esquire
Hillary Copeland, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Environmental Protection (DEP or Department) should exempt Petitioner's alleged maintenance-dredging from wetland resource

permitting under Florida Administrative Code Rule 62-312.050(1)(e).¹

PRELIMINARY STATEMENT

On December 4, 2007, the Department determined that Petitioner's proposal was not exempt and gave notice of intent to deny Petitioner's application for an exemption for alleged maintenance dredging. On March 27, 2009, Petitioner filed a second amended petition for an administrative hearing. On April 2, 2009, DEP referred the petition to DOAH for appointment of an ALJ. The matter was scheduled for a final hearing on May 27, 2009, but the parties jointly moved for an abeyance, which was granted. On July 10, 2009, the parties requested a final hearing, which was scheduled for July 29, 2009, by video teleconference.

The parties filed a Joint Pre-Hearing Stipulation on July 23, 2009, which was amended before the final hearing. The Amended Joint Pre-Hearing Stipulation was filed after the hearing, on July 31, 2009.

The parties stipulated to the admission of Exhibits 1, 4, 40, 48, 52, and 73-99. Petitioner called Michael Mathews, Environmental Supervisor II employed in DEP's Panama City office DEP. DEP called Mr. Mathews and Jim Stoutamire, a Program Administrator employed in DEP's Tallahassee office.

After the presentation of evidence, DEP requested a Transcript of the final hearing, and the parties were given ten

days from the filing of the Transcript in which to file proposed recommended orders (PROs). The Transcript was filed on August 11, 2009. The parties' timely PROs have been considered.

FINDINGS OF FACT

1. Petitioner has applied for a maintenance-dredging exemption from wetland resource permitting for two channels in Goose Bayou on the two ends of a U-shaped upland cut canal adjacent to Goose Bayou.

2. Rule 62-312 provides in pertinent part:

(1) No permit shall be required under this chapter for dredging or filling . . . for the projects listed below.

* * *

(e) The performance of maintenance dredging of existing manmade canals, channels, and intake and discharge structures, where the spoil material is to be removed and deposited on a self-contained, upland spoil site which will prevent the escape of the spoil material and return water from the spoil site into surface waters of the state, provided no more dredging is performed than is necessary to restore the canal, channels, and intake and discharge structures to original design specifications, and provided that control devices are used at the dredge site to prevent turbidity and toxic or deleterious substances from discharging into adjacent waters during maintenance dredging. This exemption shall apply to all canals constructed before April 3, 1970, and to those canals constructed on or after April 3, 1970, pursuant to all necessary state permits. This exemption shall not apply to the removal of a natural or manmade barrier separating a canal or canal system from adjacent waters of the state. Where no previous permit has been issued by the Board of Trustees of the Internal Improvement Trust Fund or the United States Army Corps of Engineers for construction or maintenance

dredging of the existing manmade canal or intake or discharge structure, such maintenance dredging shall be limited to a depth of no more than 5 feet below mean low water.

3. There was no evidence of any dredging or application for dredging in the vicinity of the proposed alleged "maintenance-dredging" prior to 1971. There was evidence and a stipulation that Heritage Homes of Fort Walton, Inc. (Heritage Homes), applied to the State of Florida in or around 1971 to dredge two navigation channels in Goose Bayou for a project known as Venetian Villas and to remove two plugs separating a land-locked U-shaped canal from Goose Bayou. The navigation channels were to be 50 feet wide by five feet deep. The southern channel was to be 640 feet long, while the northern channel was to be 450 feet long. This proposal did not receive any governmental authorization.

4. There was evidence and the parties stipulated that in 1973, based on the proposed project modifications, the State of Florida Department of Pollution Control (DPC), a predecessor of DEP, issued water quality certification, and the State of Florida Board of Trustees of the Internal Improvement Trust Fund (BOT) issued a permit for the project, as modified.

5. It appears that the issuance of the water quality certification and BOT permit was part of some kind of settlement reached between Heritage Homes and the State of Florida for dredge-and-fill violations. It appears that the settlement also

involved the conveyance of ten acres of land to the State of Florida in lieu of payment for the spoil used in filling the marsh lands between Goose Bayou and the U-shaped canal.

6. There was evidence and the parties stipulated that, at some point in time, the DPC certification and a BOT permit were transferred from Heritage Homes to West Florida Construction Company (West Florida).

7. There was evidence and the parties stipulated that, as of July 13, 1973, neither Heritage Homes nor West Florida had applied to the United States Army Corps of Engineers (Corps) for a permit.

8. There was evidence and the parties stipulated that, over time and after receiving comments from various governmental agencies, West Florida's proposed project changed to involve a yacht basin/marina, a proposed southern channel, elimination of the proposal for a northern channel, and plugging the U-shaped canal to keep it separate from Goose Bayou. The location of the single, southern channel under this proposal was different from the proposed location of the southern channel under the Heritage Homes proposal, which was to start at the southernmost arm of the U-shaped canal. Instead, under West Florida's proposal, the single, southern channel was to be located directly north of the southernmost arm of the U-shaped canal.

9. There was evidence and the parties stipulated that, by August 21, 1974, West Florida applied to the Corps for a permit

to dredge the single, southern channel (50 feet wide, 565 feet long, and four feet deep), to keep the northern canal plugged, and to construct a yacht basin/marina.

10. There was evidence and the parties stipulated that, the United States Department of the Interior Fish and Wildlife Service (FWS) and the United States Environmental Protection Agency (EPA) recommended several changes to the project before they could recommend that the Corps issue a permit for the 1974 application; however, it does not appear that the recommended changes were ever made or that the Corps ever took any action on the 1974 application or issued any permit for the proposed project.

11. At some point in time after 1974, the two plugs were removed, which connected the U-shaped canal to Goose Bayou. There is now a wide, shallow channel from the waterward ends of the U-shaped canal into Goose Bayou. The evidence did not prove that these channels, which Petitioner now seeks to maintenance-dredge, were ever dredged by man. Their width and shallow depth are more consistent with natural scouring from surface water runoff leaving the canal system at low and extreme low tides than with dredging. There was no evidence of soil borings, which could have verified whether the channels had been dredged by man.

12. Even if originally dredged, there was no evidence that a dredged channel had been maintained over the years. Mr. Stoutamire testified that DEP does not consider maintenance-

dredging to include the restoration or rebuilding of a channel that has not been maintained and no longer exists. This interpretation of the maintenance-dredging exemption is reasonable.

13. Mr. Stoutamire also testified that DEP interprets the last sentence of Rule 62-312.050(1)(e), limiting maintenance-dredging to no more than five feet below mean low water where no previous permit has been issued, to refer to canals constructed before April 3, 1970, since maintenance-dredging of canals constructed after that date would not be exempt if not previously permitted. This interpretation is reasonable.²

14. Petitioner's application did not state that control devices would be used to prevent turbidity and toxic or deleterious substances from discharging into adjacent waters during dredging.

CONCLUSIONS OF LAW

15. As applicant, Petitioner had the burden of proving entitlement to the maintenance-dredging exemption. See Hough v. Menses, 95 So. 2d 410, 412 (Fla. 1957); Key v. Trattman, 959 So. 2d 339, 345 (Fla. 1st DCA 2007).

16. Petitioner failed to meet its burden of proof of entitlement to a maintenance-dredging exemption under Rule 62-312.050(1)(e). The evidence did not prove that the channels sought to be maintenance-dredged were previously dredged and

maintained, or that previous dredging was "pursuant to all necessary state permits." Fla. Admin. Code R. 62-312.050(1)(e).

17. Because Petitioner did not prove entitlement to exempt maintenance-dredging, it is not necessary to determine whether an exemption would include--as a matter of law, and despite not being included in Petitioner's application--the use of "control devices . . . at the dredge site to prevent turbidity and toxic or deleterious substances from discharging into adjacent waters during maintenance dredging." Id.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department enter a final order denying Petitioner a maintenance-dredging exemption under Rule 62-312.050(1)(e).

DONE AND ENTERED this 16th day of September, 2009, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of September, 2009.

ENDNOTES

1/ All rule references are to the version of the Florida Administrative Code in effect at the time of the final hearing.

2/ Mr. Stoutamire also testified that, in the rare case of a dredging permit issued before April 3, 1970, maintenance-dredging would be limited to the design specifications of the permit, but that interpretation is not germane to this case.

COPIES FURNISHED:

Brynna J. Ross, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000

Bill Britton
Goose Bayou Homeowner's Association
4002 Valencia Court
Panama City, Florida 32405-3221

Michael W. Sole, Secretary
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000

Tom Beason, General Counsel
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000

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

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.