

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
Petitioner,)
)
vs.) Case No. 10-3000
)
EDITH PEPPER AND LYLE SPENCER,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, D.R. Alexander, on January 28, 2011, in St. Augustine, Florida.

APPEARANCES

For Petitioner: Kirk S. White, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

For Respondents: Lyle Spencer, pro se
3100 Coastal Highway
St. Augustine, Florida 32082-2215

STATEMENT OF THE ISSUES

The issues are whether Respondents engaged in unauthorized construction on their property in St. Johns County (County) without a permit; whether they should remove wooden shore-normal

retaining walls and concrete sidewalks from an area seaward of the coastal construction control line (CCCL); whether they should restore any disturbed areas; and whether they should pay a \$1,000.00 administrative fine.

PRELIMINARY STATEMENT

On May 10, 2010, Petitioner, Department of Environmental Protection (Department), issued a Final Order determining that Respondent Edith Pepper had engaged in unauthorized construction seaward of the CCCL, that certain corrective action should be taken, and that she should pay a \$1,000.00 administrative fine. On June 1, 2010, Respondents Edith Pepper and Lyle Spencer, who own the subject property, filed a petition for administrative hearing in which they contested the Department's proposed action. The petition was forwarded by the Department to the Division of Administrative Hearings on June 2, 2010, with a request that an administrative law judge be assigned to conduct a hearing.

By Notice of Hearing dated June 14, 2010, the matter was scheduled for final hearing on July 29, 2010, in St. Augustine, Florida. At the Department's request, the final hearing was rescheduled to October 19, 2010, and then again to December 1, 2010. A further continuance was granted, and the matter was rescheduled to January 28, 2011, at the same location.

A Joint Pre-Hearing Stipulation (Stipulation) was filed by the parties on January 21, 2011. At the final hearing, the Department presented the testimony of Trey Hatch, an Environmental Specialist in the Department's Northeast District Office (District Office); Lori T. Nichols, who with her brother owns the property immediately south of Respondents' property; and Dr. Kenneth Reinhold, who owns the property immediately north of Respondents' property. Also, it offered Department Exhibits 1-12, which were received in evidence. Exhibits 8 and 12 are the affidavits of David A. Kriger, Permit Manager for the Department's Bureau of Beaches and Coastal Systems, and Lindsay Haga, a planner with the St. Johns County Growth Management/Development Review Division. By agreement of the parties, the affidavits are being used in lieu of live testimony. Respondent Lyle Spencer testified on behalf of Respondents. Also, he offered Respondents Exhibits 1-3. Exhibits 1 and 2 were received, while proffered Exhibit 3 was not received. Finally, Florida Administrative Code Chapter 62B-54 and sections 161.053 and 161.054, Florida Statutes (2010), were officially recognized.

There is no transcript of the hearing. Proposed findings of fact and conclusions of law were filed by the Department on February 24, 2011, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Edith Pepper and Lyle Spencer are the owners of property located at 3100 Coastal Highway (also known as U.S. Highway A1A), St. Augustine, Florida. Although Ms. Pepper is named as the respondent in the enforcement action initiated by the Department, as owners of the property, both she and her husband are responsible for complying with Department rules and governing statutes.¹

2. The Department is the regulatory agency charged with the duty of permitting and enforcing construction activities seaward of the CCCL.

3. There are existing residences on both the north and south sides of Respondents' property. The parcel south of the subject property is owned by Lori T. Nichols and her brother, while the parcel on the north side is owned by Dr. Kenneth Reinhold.

4. A small, one-story coquina house constructed in 1935 sits on the western side of Respondents' property facing the Coastal Highway and was occupied by Respondents for an undisclosed period of time after they purchased the property. In response to a CCCL application filed by Ms. Pepper, on November 20, 2002, the Department issued Permit No. SJ-844 to Ms. Pepper authorizing the construction of a large, 3-story single-family residence and deck, other structural activity,

excavation, and placement of approximately 1,900 cubic yards of fill seaward of the CCCL. See Department Exhibit 1. When completed, the new home will be more than 8,000 square feet and sit on the eastern side of the parcel facing the Atlantic Ocean. The large amount of fill placed on the construction site resulted in raising the elevation of Respondents' property to between two and four feet above their neighbors' adjoining lots.

5. Permit No. SJ-844 contains a detailed description of the location, dimensions, and structural activities for the project, including a requirement that it have "[d]rainage swales on the north and south sides of the [new] dwelling." Id. Another authorized activity was the construction of a "concrete driveway 120 feet in the shore-normal direction by 12 feet in the shore-parallel direction [to] be located a maximum of 54 feet seaward of the control line with control joints on 5-foot centers each way." Id. Special Permit Condition 4 further required that "[a]ll rubble and debris resulting from this construction shall be removed to a location landward of the [CCCL]." Id. Photographs received in evidence show that construction on the residence is now substantially completed. However, due to zoning code issues, a stop work notice was placed on the property by the County in 2008, and a Certificate of Occupancy has never been issued.

6. On March 21, 2006, Ms. Pepper submitted a request to the Department to modify Permit No. SJ-844 and authorize the construction of a swimming pool, pool deck, and dune walkover seaward of the CCCL. The Final Order indicates that the application to modify the permit is now complete, but Ms. Pepper has waived the requirement that the Department take action on her request within 90 days after the application is deemed to be complete. Therefore, the modification has never been approved.

7. On February 5, 2008, an Environmental Specialist in the District Office, Trey Hatch, conducted a routine inspection of the site and observed the unauthorized construction of wood retaining walls on the north and south property lines, the demolition and removal of a "derelict" septic tank and drain field seaward of maximum construction limits, and the storage of construction debris seaward of the maximum construction limits. See Department Exhibit 2. These activities were performed without Department approval. Mr. Hatch spoke with Mr. Spencer and advised him that any work beyond the scope of his permit required Department approval, and that the observed activities may be a violation of his permit.

8. On February 20, 2008, the Department issued a Warning Letter to Ms. Pepper advising her that the activities observed by Mr. Hatch appeared to be in violation of her permit and section 161.053(2)(a). See Department Exhibit 3.

9. After receiving a telephone call from "a citizen," on April 28, 2008, Mr. Hatch conducted a follow-up inspection of Respondents' property. He observed the construction of wood retaining walls along the north and south property lines; retaining walls still in place; the demolition and removal of a derelict septic tank and drainfield seaward of maximum construction limits; grading seaward of the new dwelling and creation of a 24' by 30' swale with berm sidewalls (which he believed might be for an above-ground swimming pool); and storage of building materials and debris seaward of maximum construction limits. See Department Exhibit 4. Mr. Hatch's report noted that "debris [observed during the February 5, 2008, inspection] has been removed." Id. During the inspection, Mr. Spencer advised Mr. Hatch that he was doing "perc tests," and not installing a swimming pool.

10. On May 5, 2008, the Department issued a Notice of Violation/Cease and Desist Unauthorized Activities Seaward of the [CCCL] (Notice). See Department Exhibit 5. The Notice stated that the "violation consists of excavation, grading and placement of fill material seaward of the [CCCL] without benefit of a permit from the Department." Id. The Notice required Respondents to cease all unauthorized activities seaward of the CCCL and to respond to the Notice within ten days of receipt. Whether a response was filed is not of record.

11. On May 12, 2008, Mr. Hatch conducted another on-site inspection of Respondents' property and observed that the wood retaining walls were still in place, and that Respondents had extended the retaining wall on the south side of the property to the western end of the existing wall. The violations observed on the April 28, 2008, inspection persisted. He also observed that the County had placed a stop work notice on the property. A Violation Report summarizing these activities was prepared by Mr. Hatch. See Department Exhibit 6.

12. On June 6, 2008, the Department issued a letter advising Ms. Pepper that violations were occurring on her property; that Respondents' request filed on March 18, 2008, to "hold the file in abeyance" for 60 days pending the filing of an after-the-fact permit application that would authorize the retaining walls had expired; and that recently constructed concrete sidewalks on the property were not authorized under her permit. See Department Exhibit 7. The letter allowed Respondents an additional 21 days in which to file an after-the-fact application for both unauthorized activities; otherwise, it warned that an enforcement action would be initiated.

13. After Respondents built the retaining walls, Dr. Reinhold, whose residence adjoins Respondents' property to the north, was forced to place two-by-fours against his fence because Respondents' retaining walls and fill were causing his

fence to "bow" out. He also noted that fill is creeping under the fence and flowing onto his yard. Because of concerns that stormwater would now be forced onto his property, in the summer of 2008 he engaged the services of a professional engineer "to evaluate the conditions of [his] property . . . as it relates to problems with ongoing, adjacent construction [on Respondents' property]." Department Exhibit 10. The engineer's report indicated that there were no swales on Respondents' property to direct runoff to the front or rear yards; that the retaining walls were not stabilized; that in the event of a storm surge of ocean water, the fill and unauthorized sidewalks would have the potential of pushing more ocean water onto the adjoining properties; and that Respondents' deviation from permit requirements created a "very serious" situation. Id. These conclusions were not disputed by Respondents.

14. Ms. Nichols, who owns the property to the south, stated that Respondents' retaining walls were leaning onto her property and there were gaps in the wall, which allowed run-off onto her property. Photographs received in evidence confirmed these concerns. See Department Exhibit 11.

15. On June 5, 2009, the Department received an after-the-fact application for a CCCL permit from Ms. Pepper. However, the application was deemed to be incomplete in a number of respects, including a failure to attach a letter from the County

indicating that all local zoning and setback requirements had been satisfied. See Department Exhibit 8.

16. On May 10, 2010, the Department issued a Final Order advising Ms. Pepper that Respondents had initiated construction of wooden shore-normal retaining walls on their north and south property lines and concrete sidewalks on the sides of the existing single-family dwelling seaward of the CCCL without a Department permit. At hearing, Mr. Spencer did not dispute the accuracy of these charges.

17. As mitigating circumstances, Mr. Spencer noted that he is currently in litigation with the County seeking to obtain approval of his site plan so that a letter indicating compliance with local zoning requirements can be filed with the Department. Until he secures a letter, the after-the-fact application cannot be completed. See Fla. Admin. Code R. 62B-33.008(3)(d). He indicated that a hearing in the circuit court case was scheduled on February 11, 2011, but the outcome of that matter is not of record. In a letter dated April 15, 2010, the County advised Respondents that their new home "contravenes local zoning regulations," but there are options available that would allow construction to proceed. See Department Exhibit 12. In order to complete construction of their new home, Respondents must agree to one of the following changes: removal of the one-story coquina residence; a reduction in the size of the guest house,

private garage, or accessory family unit; or filing an application for a zoning variance to the front yard setback requirements for the one-story coquina residence in conjunction with one of the three reduction options described above. In addition, they must prepare and file a lot grading plan demonstrating that any fill added will not direct water to adjoining properties or block natural water flow from adjacent properties. Id. Until these steps are taken, the County will not provide a letter to Respondents confirming that the proposed activity does not contravene local zoning and setback requirements.

18. Even though Permit No. SJ-844 required that drainage swales be constructed on both sides of the parcel, they were not built because Mr. Spencer concluded they would not work and, if installed, they would result in flooding on his property. After considering several alternatives, such as vertical landscaping and limerock, he decided that a small retaining wall would work best. However, this decision was the result of his own calculations and was not based on advice from a professional engineer. He also stated that he was advised by his engineer that no permit was required for retaining walls. More likely than not, however, the engineer was referring to requirements for a local building permit, and not a Department CCCL permit.

Because of the engineer's advice, Mr. Spencer stated that he did not know he needed Department approval for the retaining walls.

19. Mr. Spencer further noted that he was required to follow structural guidelines established by the Federal Emergency Management Agency (FEMA) and to place concrete slabs (sidewalks) on the sides of his house to help stabilize and support the second and third floors of the home in the event of a large storm event.

20. Mr. Spencer stated that he has reduced the amount of fill authorized by the permit by 25 percent, and by installing sidewalks in lieu of a 120-foot driveway, he has used 1,200 cubic yards less concrete than is otherwise authorized. Even if the corrective action is taken, he opined that a large storm event will "wash away" his neighbors' homes, whose construction predates the new FEMA guidelines. Mr. Spencer acknowledged that he can easily remove the retaining walls, but if he does so, there will be nothing to prevent runoff from his higher elevated property onto the adjoining parcels. Finally, he expressed a willingness to comply with the permit conditions, but at the same time says he wants the Department to provide "a solution" to all of the objections to the project.

21. Given the foregoing circumstances, the Department's proposed corrective action is deemed to be reasonable, and

Respondents should remove the unauthorized retaining walls and concrete sidewalks and restore all disturbed areas.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over this matter pursuant to sections 120.569 and 120.57(1).

23. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. See, e.g., Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977). Therefore, the Department has the burden of proving by a preponderance of the evidence that the charges, corrective action, and proposed administrative fine in the final order should be sustained.

24. Section 161.053(2)(a) provides that once a CCCL is established, no person may construct any structure, excavate, remove any beach material, or otherwise alter any ground elevation seaward of the CCCL without meeting the requirements of the law. Subsection 161.053(4) provides that "a permit to alter, excavate, or construct on property seaward of established [CCCLs] may be granted by the department" if certain requirements are met. Subsection (6) provides that "[a]ny coastal structure erected, or excavation created, in violation of this section is declared to be a public nuisance and such structure shall be removed or such excavation shall be refilled

after written notice by the department directing such removal or filling."

25. Rule 62B-54.002(1) provides that the Department "shall assess fines for willful violations of, or refusing to comply with, Sections 161.041, 161.052, and 161.053, Florida Statutes, or any rule or order prescribed by the Department thereunder." The rule establishes a range of fines to be assessed, depending on whether there is major, moderate, or minor harm to the resource or potential for harm. Subsection (3) of the rule provides that in assessing the fine, the Department shall consider the offender's past violations, if any, and other aggravating or mitigating circumstances. "Aggravating circumstances include prior knowledge of the rules, or willful or knowing violations of department orders[.]" Id. "Mitigating circumstances" include, but are not limited to, "an emergency situation in which activities are performed to alleviate imminent collapse or undermining of a structure without obtaining a permit, or obtaining a local permit for activities and not a department permit." Id. In this case, although the Department has characterized the violations as posing a "minor" potential for harm, it says they are "willful," and it seeks to impose the maximum fine under that category, or \$1,000.00.

26. The Department's charging document alleges that Respondents have constructed wooden shore-normal retaining walls

and concrete sidewalks and performed excavation beyond the CCCL without a Department permit. Respondents did not dispute the accuracy of these charges, and the evidence supports a conclusion that the violations occurred. While Respondents are understandably frustrated by their inability to complete the construction of a new home, they nonetheless deviated from the terms and conditions of their permit without Department approval. Despite numerous warnings from the Department, they have failed to take any corrective action since 2008. Therefore, the violations are deemed to be "willful," and the assessment of the maximum \$1,000.00 fine is reasonable under the circumstances. The proposed corrective action (removal of the unauthorized retaining walls and sidewalks and restoration of disturbed areas, if any) is appropriate and should be approved.

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 sustaining the charges in its Final Order. Respondents shall remove the unauthorized wooden shore-normal retaining walls and concrete sidewalks from the area seaward of the CCCL and restore any areas disturbed during the removal process within 30 days after a final order is entered in this matter. Further, Respondents shall pay a \$1,000.00

administrative fine within the same time period. The check shall be mailed to Administrative Enforcement Section, Ecosystem Management and Restoration Trust Fund, Attention: Jim Martinello, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000. The check should be payable to the Ecosystem Management and Restoration Trust Fund and include reference to file number VSJ 08-03 and OGC No. 10-1480.

DONE AND ENTERED this 4th day of March, 2011, in Tallahassee, Leon County, Florida.



D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of March, 2011.

ENDNOTE

1/ At hearing, Mr. Spencer stated that while he was out of the state in 2002, his wife filed an application for a CCCL permit. Because she signed the application, the Department has directed all correspondence since that time to her, rather than both of them. In their request for a hearing filed in May 2010, Respondents listed the address of the subject property, 3100 Coastal Highway, St. Augustine, as their mailing address. However, recent papers sent to Mr. Spencer at that address have been returned with the notation that he had moved and left no forwarding address. Therefore, a copy of this Recommended Order

has been sent to Edith Pepper at that address and is presumably being forwarded to her temporary out-of-state address, and to Mr. Spencer at what is believed to be his current mailing address.

COPIES FURNISHED:

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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.