

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BOARD OF TRUSTEES OF THE)
INTERNAL IMPROVEMENT TRUST FUND)
OF THE STATE OF FLORIDA,)
)
Petitioner,)
)
vs.) Case No. 10-6553
)
JAMES R. THERRIEN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On October 7, 2010, a video hearing was held in this case with video sites in Daytona Beach and Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Christopher Thomas Byrd, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

For Respondent: James R. Therrien, pro se
237 North Halifax Avenue
Daytona Beach, Florida 32114-4121

STATEMENT OF THE ISSUE

The issue in this case is whether the Board of Trustees of the Internal Improvement Trust Fund (BOT) should charge Respondent with lease payments and fine him for unauthorized use

of sovereignty submerged lands under the Halifax River in Daytona Beach.

PRELIMINARY STATEMENT

BOT served Respondent with a Notice of Violation (NOV), and Respondent requested an administrative hearing. The matter was referred to DOAH to be assigned to an ALJ to conduct the hearing, which was scheduled to take place by video conference. While at DOAH, BOT was granted leave to file its First Amended NOV, Orders for Corrective Action, and Administrative Fine Assessment (First Amended NOV).

At the final hearing, BOT called one witness, Aaron Watkins, an Environmental Manager with the Department of Environmental Protection (DEP), and had BOT Exhibits 1-7 admitted in evidence. Respondent testified in his own behalf and had Respondent's Exhibits 1-18 admitted in evidence.¹ Respondent indicated that he was going to arrange for the filing of a transcript of the final hearing but did not do so. Respondent declined to file a proposed recommended order (PRO). BOT's PRO has been considered.

FINDINGS OF FACT

1. Respondent owns residential property on the Halifax River in Daytona Beach.
2. In 2004, he entered into a Sovereignty Submerged Lands Lease with BOT to allow him to construct a single-family dock

structure into the Halifax River from his property. In 2007, he entered into a Modification to Increase Square Footage (Modified Lease). The Modified Lease covered 2,714 square feet, required an annual lease fee of \$423.89, and expired on November 16, 2008.

3. The Modified Lease provided for a late charge equal to interest at the rate of 12 percent per annum from the due date until paid on any lease fees not paid within 30 days from their due dates. There was no evidence that any lease fee under the Modified Lease was not paid or paid late.

4. In August 2008, BOT attempted to have Respondent enter into a Lease Renewal. He did not renew his lease, and the Modified Lease expired on November 16, 2008. Respondent paid no lease fees for 2008/2009.

5. In September 2009, BOT again attempted to have Respondent enter into an updated Lease Renewal at an annual lease fee of \$436.78 and pay current and past due lease fees. BOT placed Respondent on notice that his failure to do so could be considered a willful violation of Chapter 253, Florida Statutes, which could subject Respondent to administrative fines of up to \$10,000 a day.

6. Respondent did not renew his lease or pay any lease fees. Instead, he complained (as he claims to have since 2005) that a stormwater outfall structure installed by the Florida

Department of Transportation (DOT) in 1998 approximately 100 feet to the north (upriver) of his dock structure, at the end of Ora Street, was not functioning properly and was allowing silt to enter the river, shoaling the water in the area of Respondent's dock structure (and elsewhere in the vicinity) and eventually making it impossible for Respondent to moor his boat at his dock structure and navigate to the Intracoastal Waterway (ICW).

7. The DOT outfall structure at Ora Street has been in existence since the 1950's. In 1998, DOT added a silt box, which is not functioning properly and is allowing silt to enter the river. The evidence is not clear whether silt from the DOT outfall structure was entering the river before 1998.

8. In 2010, BOT informed Respondent by certified mail that it had contacted the DOT at Respondent's request and determined that DOT was planning to clean and monitor the outfall structure after August 2010 but had no plans to dredge sediment from the river. BOT also placed Respondent on notice that he was in violation for not renewing his lease and paying all current and past due fees, and that he would be fined and required to remove his dock structure if he did not come into compliance. This certified letter was designated an NOV. The evidence was not clear when the letter was sent to Respondent, but it is clear

that Respondent has continued to refuse to renew the lease, or pay any fees, and has not removed his dock structure.

9. BOT takes the position in this case that Respondent must pay: the Lease Renewal annual lease fee of \$436.78 for 2008/2009, plus the Lease Renewal late charge equal to interest at the rate of 12 percent per annum from November 30, 2010; and an annual lease fee of \$448.49 for 2009/2010, plus a late charge equal to interest at the rate of 12 percent per annum on the \$448.49 from November 29, 2009. The evidence did not explain how the annual lease fees for the years 2008/2009 and 2009/2010 were determined. (But see Florida Administrative Code Rule² 18-21.011(1)(b)10.b., set out in Conclusion of Law 24, which may explain how the annual lease fees were determined.) Invoices in evidence charge Respondent a total of \$1,283.22 through July 30, 2010: \$436.78, plus tax, for a total of \$465.17 for the year 2008/2009; \$448.49, plus tax for a total of \$477.64 for the year 2009/2010; and \$36.18 of interest on the \$448.49.

10. BOT also takes the position that Respondent must either: enter into a lease for the year 2010/2011 and beyond; remove part of his dock structure so that he will preempt only 1,150 square feet of sovereignty submerged land (so as not to require a lease, but only a cost-free consent of use); or remove the entire dock structure.

11. BOT also seeks the imposition of an administrative fine under Rules 18-14.002 and 18-14.005(5). In its First Amended NOV, BOT sought a fine in the amount of \$2,500; in its PRO, BOT seeks a fine in the amount of \$2,500 for the first offense and \$10,000 per day from the issuance of the NOV for repeat offenses.

12. Respondent believes he should not be required to pay any lease fees or fines because of his inability to use his dock structure due to the shoaling of the river caused by the malfunctioning DOT outfall structure.

13. Respondent believes it is DEP's responsibility to require DOT to remove the silt from the river and make the outfall structure work properly. He believes this is required by the state and federal constitutions, statutes, and rules, and by an unspecified "federal bond issue" or "federal bond agency."

14. DEP takes the position that the silting from the outfall structure and its adverse impact on Respondent's ability to use his dock structure is irrelevant because the requirement of a lease is based on preemption of sovereignty submerged land, not on the lessee's use of the land. DEP also believes that, under an operating agreement among governmental agencies, the St. Johns River Water Management District (SJRWMD), not DEP, is the agency responsible for enforcing the applicable environmental laws and permit conditions against DOT. DOT has

indicated to the parties that it is in the process of modifying the outfall structure so that it functions properly but that it does not have the money to remove silt from the river.

15. DEP personnel visited the site at approximately 11:00 a.m. on July 16, 2010, and measured the water in the vicinity of the terminal platform and slips of Respondent's dock structure to be approximately 36 inches deep, which is deep enough for navigation.

16. DEP did not take measurements in the slips of the dock structure, between the terminal platform and Respondent's property, or between the vicinity of the terminal platform and the ICW.

17. The evidence was not clear what the tide stage was at the Respondent's dock structure when DEP measured the water depth. DEP called the tide stage low, or near low, based in part on tidal charts for Ormond Beach and the Halifax River indicating that the tide was low at 11:21 a.m. and high at 4:10 p.m. on July 16, 2010. However, the persuasive evidence was that the tidal chart applied to locations at the beach, and there is a difference in the tides at Respondent's dock structure and at the beach. It does not appear that the tide was dead low or near dead low at Respondent's dock structure at 11:00 a.m. on July 16, 2010; it probably was between low and slack, possibly a half foot higher than dead low.

18. Regardless of the measurements taken by DEP on July 16, 2010, Respondent testified that he is not able to operate his boat from his dock structure consistently due to shoaling from the silt. He testified that, as a result, he kept his boat at a marina for a year at a cost of \$7,000 but cannot afford to continue to do so.

CONCLUSIONS OF LAW

19. Section 253.04(1), Florida Statutes,³ authorizes BOT to sue for ejectment, damages, or trespass to prevent unauthorized use of state land. Section 253.04(2), Florida Statutes, provides:

In lieu of seeking monetary damages pursuant to subsection (1) against any person or the agent of any person who has been found to have willfully damaged lands of the state, the ownership or boundaries of which have been established by the state, to have willfully damaged or removed products thereof in violation of state or federal law, to have knowingly refused to comply with or willfully violated the provisions of this chapter, or to have failed to comply with an order of the board to remove or alter any structure or vessel that is not in compliance with applicable rules or with conditions of authorization to locate such a structure or vessel on state-owned land, the board may impose a fine for each offense in an amount up to \$10,000 to be fixed by rule and imposed and collected by the board in accordance with the provisions of chapter 120. Each day during any portion of which such violation occurs constitutes a separate offense.

20. Under Rule 18-21.005(1)(d), a lease is required for Respondent's dock structure because it is too large for a consent of use under paragraph (c) of that Rule.

21. Under Rule 18-21.008(1)(b)5.:

Upon expiration or cancellation of a lease, the former lessee shall remove all structures and equipment from the leased area in accordance with the terms and conditions of the lease or as ordered under Section 253.04(2), F.S. In the event that the former lessee fails to remove all structures and equipment, the Board shall issue an order requiring the former lessee to remove the structures and equipment from the leased area. If the former lessee fails to comply with such an order, the Board shall:

a. Impose a fine under Section 253.04(2), F.S., and subsection 18-14.002(2), F.A.C.; and

b. Remove the structures and equipment and recover the cost of removal from the former lessee under Sections 253.04(1) and (5), F.S. and Chapter 18-14, F.A.C.

Failure to pay a fine imposed under subparagraph 6.a., shall result in the imposition of a statutory lien in accordance with Section 253.04(6), F.S., and Chapter 18-14, F.A.C.

This Rule does not authorize BOT to charge lease payments after expiration of a lease, but it does authorize the imposition of a fine on Respondent for not complying with BOT's order to remove his dock structure.

22. Rule 18-14.002 provides:

(1) A person or agent of a person who willfully damages state land, willfully damages or removes products from state land in violation of state or federal law, or knowingly refuses to comply with or willfully violates the provisions of Chapter 253, F.S., shall also be in violation of this rule and shall incur a fine up to \$10,000 per offense.

(2) When determining the amount of a fine to be imposed, the Board shall consider:

(a) The value of products removed from state land;

(b) The diminished value of state land or products, or the cost of restoring the affected state land or products;

(c) Lost revenue from impaired use of the affected state land;

(d) The need to deter future violations by removing any economic benefits to the violator from failure to comply with the law;

(e) Aggravating or mitigating circumstances specific to the violation, including the nature and extent of the violation, a violator's degree of cooperation in correcting the violation and a violator's good faith efforts to negotiate a settlement before formal legal proceedings begin; and

(f) Lost or impaired opportunities for public use of the affected state land.

(3) Payment of all or part of a fine may be waived when purposes of the law and this rule are not frustrated, and when fairness would result.

(4) Fines imposed pursuant to this rule shall be:

(a) \$1-\$2,500 for the first offense; and

(b) \$1,000-\$10,000 for the second or subsequent offenses.

(c) Fines for first offenses may exceed \$2,500 upon approval by the Board.

The only considerations under Subsection (2) of the rule applicable to the facts of this case are those in paragraphs (d)-(f). Also, under the facts of this case, it would be appropriate to waive part of the fine under Subsection (3) of the Rule. A \$2,000 fine would be appropriate in this case.

23. Under Rule 18-21.008(1)(b)5., Respondent must remove his dock structure, or enough of it so that no lease is required. Another alternative would be for Respondent to enter into a new lease.

24. Rule 18-21.011(1)(b) provides in pertinent part:

10. There shall be an assessment for the prior unauthorized use of sovereignty land for after-the-fact lease applications. The minimum assessment for such applications shall include:

a. Payment of retroactive lease fees; and

b. Payment of an additional annual percentage on the retroactive lease fees computed at a rate equal to two percentage points above the Federal Reserve Bank discount rate to member banks. Such rate shall be adjusted annually, on October 1 of each year.

11. There shall be a late payment assessment for lease fees or other charges due under this rule which are not paid within 30 days after the due date. This assessment shall be computed at the rate of 12 percent per annum, calculated on a daily basis for every day the payment is late.

12. If requested by the applicant, the Board shall determine, based on the following factors, whether a reduction of the assessment and an extension of the time period for payment of the assessment under the provisions set forth in subparagraph 10. above shall be granted:

a. The applicant's prior compliance with the provisions of Chapters 253 and 258, F.S., or any rules adopted thereunder;

b. Any failure of the applicant to comply with an order of the Board;

c. Whether any failure to comply under paragraphs (a) or (b) above was willful;

d. The need to deter future violations by removing any economic benefits to the applicant from failure to comply with the law;

e. Aggravating and mitigating circumstances specific to the

lease application, including the nature and extent of the violation, and the applicant's degree of cooperation in correcting the violation;

f. Whether payment of the amount of the assessment or payment by the time due would create a substantial hardship that affects the applicant significantly different than other similarly situated applicants; and

g. The inability of the applicant to pay the fees assessed.

Respondent's position in this case can be construed as a request under paragraph (12) of the Rule to reduce the assessment under paragraphs (10) and (11) of the Rule for an after-the-fact lease application. However, it would not be appropriate to grant such a request.

RECOMMENDATION

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

RECOMMENDED that BOT enter a final order: (1) that, within 10 days, Respondent sign the appropriate lease renewal and send it, along with \$1,283.22 in past due lease fees and interest owed BOT, plus the lease payment for 2010/2011, by cashier's check or money order made payable to the "Internal Improvement Trust Fund," with a notation of OGC Case No. 10-1948, sent to 3319 Maguire Boulevard, Suite 232, Submerged Lands and

Environmental Resource Program; or (2) that, within 20 days, Respondent remove his dock structure or at least enough of it to preempt no more than 1,150 square feet of sovereignty submerged; and (3) that, within 30 days, Respondent pay BOT a fine in the amount of \$2,000, by cashier's check or money order made payable to the "Internal Improvement Trust Fund," with a notation of OGC Case No. 10-1948, sent to 3319 Maguire Boulevard, Suite 232, Attention David Herbster, Program Administrator, Submerged Lands and Environmental Resource Program.

DONE AND ENTERED this 3rd day of November, 2010, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of November, 2010.

ENDNOTES

1/ Respondent indicated that he would mail 12 "google maps" and 8 emails as his exhibits 1-20, which were received over BOT's objection as to relevance. Instead, Respondent mailed 11 "google maps," which actually were aerial photographs, and 7 pages of emails (plus two other documents). The "google maps"

have been marked and received as Respondent's Exhibits 1-11; the email pages have been marked and received as Respondent's Exhibits 12-18.

2/ Unless otherwise specified rule references are to the version of the Florida Administrative Code in effect at the time of the final hearing.

3/ All statutory references in the Conclusions of Law are to the 2010 codification of the Florida Statutes.

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.