

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELIZABETH PADRON,

Petitioner,

vs.

Case No. 12-3291

CARL J. EKBLUM AND DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.
_____ /

RECOMMENDED ORDER

This matter was heard before the Division of Administrative Hearings (DOAH) by its assigned Administrative Law Judge, D. R. Alexander, on March 5, 2013, by videoconferencing at sites in Marathon and Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Carl J. Ekblom's (Ekblom's) application to install a boatlift at an existing dock in a man-made body of water in Islamorada is exempt from the need for an Environmental Resource Permit (ERP).

PRELIMINARY STATEMENT

On August 20, 2012, the Department of Environmental Protection (Department) gave notice that Ekblom's application to install a boatlift on an existing dock in Islamorada was exempt from Department permitting requirements and did not require proprietary review. Petitioner, Elizabeth Padron (Padron), who owns the existing dock on the adjacent lot, filed her Petition for Administrative Hearing challenging that determination. The matter was then referred by the Department to DOAH. Prior to hearing, Padron filed an Amended Petition. The case was later transferred from Administrative Law Judge Bram D.E. Canter to the undersigned.

Numerous discovery disputes arose during the course of this proceeding and their disposition is shown on the docket sheet. A PreHearing Stipulation (Stipulation) was filed by the parties.

At the final hearing, Petitioner presented the testimony of Dr. Paul Lin, a coastal engineer and accepted as an expert in coastal engineering; Captain Thomas E. Danti, accepted as an expert in navigation; and Marcus J. Soto, Petitioner's son.

Also, Petitioner's Exhibits 1-10 were received in evidence. Exhibit 10 is the deposition testimony of Padron. The Department presented the testimony of Celia E. Hitchens, an Environmental Specialist II and accepted as an expert in applying ERP rules. Also, Department Exhibits 1-7 were received in evidence. Ekblom testified on his own behalf and presented the testimony of Randy Whitesides, an expert in marine construction; and Robert J. Camuccio, an expert in navigation. Finally, Respondent's Exhibits 1-4, 6, and 14-18 were received in evidence.

A Transcript of the hearing (two volumes) has been prepared. Proposed Findings of Fact and Conclusions of Law were timely filed by each party, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Background

1. Ekblom owns property and resides at 107 South Drive (Lot 27), Islamorada. Padron owns the neighboring property immediately to the south located at 109 South Drive (Lot 28).

2. The two pie-shaped lots sit at the V-shaped western end of Plantation Lake, an artificial body of water on which several houses are located. Each of the two properties has a marginal dock running along the shoreline that meets to form an acute angle.¹ A 33-foot finger pier juts out from the vertex of the

angle, running along the border of the property line. Pursuant to an understanding with the prior owner of Lot 28, and later formalized in an easement agreement, for the past 12 years Ekblom has used the north side of the finger pier to moor a 35 to 36-foot long boat with a beam of about 12 feet, six inches.² During that time, he has never had a navigational incident or complaint. Recently, he purchased a slightly smaller boat that is 31 feet, seven inches long and will replace the larger vessel. The outboard motors will add an additional two feet.

3. A jet ski lift currently exists on the north side of the finger pier and can only be accessed and used from that side of the pier. It was purchased, paid for, and installed by Ekblom in 2000 pursuant to an agreement with the prior owner of Lot 28. See Endnote 2, infra. The jet ski lift has not been used by Ekblom since 2004. The drawings submitted by Ekblom with his verification application did not depict the lift.

B. The Project

4. Ekblom has contracted with a marine construction firm to install a boat lift for his new boat. The lift will be on the north side of the finger pier, in a location selected to provide for straight ingress and egress.

5. After inspecting the property, the contractor decided that a four-post, or cradle lift, is the best option for the

space, to allow for a straight-in ingress and egress. A cradle lift consists of four pilings, one on each corner. Two lifting mechanisms sit on top of the pilings, running parallel to the boat's location, and a set of cables reach down from the pilings to a pair of lifter beams used to lift the boat out of the water. Ekblom selected a 13,000-pound cradle lift, which is approximately 12 feet, six inches, center to center, by 12 feet, six inches, out to out. A ten-inch piling on either side will add an additional five inches on either side of the center to center measurement. The lift is not physically attached to the pier because a four-post lift is freestanding, as opposed to an elevator lift, which attaches to the side of a seawall or dock.

6. The lift will need to be placed adjacent to the finger pier so that it is approximately two feet inside of Ekblom's property line. The boat will be moored bow-in, so that two-thirds of the boat's overall length will be towards the inside of the finger pier.

7. The contractor prepared the drawing depicting the placement of the lift, which was attached to Ekblom's application. The drawing, which was not to scale, showed the lift as 12 feet, six inches, by 14 feet. Use of a boarding platform or access walkway will be necessary to get to the boat on the lift, but this was not shown on the application.

8. On August 10, 2012, an Environmental Specialist II, Celia Hitchins, who reviews between 30 and 60 exemption applications per month, reviewed Ekblom's request to install the cradle lift. The submittal consisted of a cover letter, an application, a property record card, a copy of the easement, and project drawings and specifications. Ms. Hitchins determined that the project was exempt from ERP permitting requirements under Florida Administrative Code Rule 40E-4.051(3)(b)(1995).³ Because the activity would take place in an artificially created body of water, no proprietary review was required.

9. After an exemption letter was issued, in October 2012 Ekblom filed a corrected application with new project drawings, but the project was not changed in any substantial way. After a challenge to the Department's determination was filed by Padron, Ms. Hitchins conducted a site inspection in February 2013. She did not change her original determination.

10. The project drawings do not depict the boat lift as physically attached to the finger pier. About half of the exemptions Ms. Hitchins reviews are for elevator lifts, which attach to a dock, and the other half are for cradle lifts, which do not need to be physically attached to the dock. Both types of structures may be exempt, as the Department interprets the word "attached" in rule 40E-4.051(3)(b) to mean either physically attached or in close proximity and associated with a

docking facility. "Close proximity" means a close step, or a reasonable step, or some sort of means of access, such as a boarding platform or access walkway. It does not include needing to run and jump on the vessel or needing to swim to the vessel. This is a more reasonable and logical interpretation of the rule than the narrow one advocated by Padron. Ms. Hitchins determined from the project drawings that the lift was in close proximity to the finger pier and met the requirements of the rule.

11. Padron engaged Dr. Lin to take measurements of the project area and develop scaled drawings. In these scaled drawings, he depicted the boat lift as 12 feet, six inches, by 14 feet, ten inches. He arrived at the latter measurement by using the generic drawing specifications for the 16,000-pound boat lift that showed the width as 14 feet from center to center, and added ten inches to accommodate a ten-inch piling on each side.

12. Dr. Lin prepared six alternative placements of the boat lift, including placements with a two and eight-foot "safety zone" (buffer zone) between the boat on the lift and Ekblom's marginal dock.

C. Petitioner's Objections

13. In the parties' Stipulation, Padron contended that the boat lift will not be used for recreational, non-commercial

activities; it will involve filling or dredging other than necessary to install the pilings; it will create a navigational hazard; and it will not be the sole dock constructed pursuant to the exemption. She also argued that the boat lift must be physically "attached" to the finger pier. In her Proposed Recommended Order, however, she focuses primarily on whether the boat lift will create a navigational hazard and whether the cradle lift must be physically attached to the finger pier in order to qualify for an exemption.

14. Padron purchased her home in January 2011. Between May and July 2012, she expended around \$18,000.00 in maintenance work on the finger pier. She testified that she opposes Ekblom's proposed boat lift because it will prevent her from having full and complete use of the pier and will be dangerous to people jumping into the water near it. She owns a 23-foot boat, but only her son uses it. When not in use, the boat is normally stored in her garage or at her primary residence in Miami. She has never swum in the basin behind her house, and she does not kayak. Her family occasionally swims in the water. In both her pleadings and testimony, Padron suggests that if this appeal is unsuccessful, she is going to have the finger pier demolished.

15. Marcos Soto, Padron's son, who resides in Miami, tries to visit his mother's house on weekends when he "[has] the

chance." He testified that "we" use the area behind the house for boating, swimming, and fishing. However, only he and his nephew fish. Mr. Soto owns three small boats and plans to purchase a jet ski. He acknowledged that his primary objection to the boat lift is that he will be unable to use the jet ski lift. Mr. Soto has no ownership in the property.

a. Recreational, Non-commercial Activities

16. Ekblom testified that he will use the boat and lift for recreational purposes. Padron offered no contrary evidence on this point.

b. Dredging

17. To install the lift, the contractor will generally use a drop hammer from a crane on a barge to punch four holes for the pilings. Installation does not involve any more excavation than that. Also, Ms. Hitchins did not see anything in the plans that would require dredging or filling. Therefore, the lift will not require more dredging and filling than necessary to install the pilings. This evidence was not refuted.

18. The proposed exemption does not include any exemption determination as to electrical service.

c. Navigational Hazard

19. There are no channel markers in the middle of the basin, and the basin has only one exit and entrance at its eastern end. The lift will be located at the dead end of the

waterway, in an area of the basin in which only a few boats would navigate. Also, the boat will be on the lift in the same position as if Ekblom tied it to the finger pier. The small inlet into the basin limits the size of a boat coming in, and the water in the basin is calm, compared to the open ocean.

20. Ekblom's neighbor to the northeast on Lot 26, Carl Wright, docks a 30-foot boat on the seawall in front of his property. When Mr. Wright leaves his dock, he pushes the stern of his boat away from the seawall, and backs away. Once he clears the seawall with his bow, he puts the port engine in forward, turns the boat on its center, then leaves the area with the bow pointing out. When he returns, he parks the boat against the seawall. There is no way for Mr. Wright to egress bow first. Mr. Wright did not file any objection to the project.

21. Ekblom will egress parallel to the finger pier. He will never need to navigate on the south side of the finger pier. Once the lift is installed, Ekblom will not use his marginal dock to moor another boat, as one will not fit there.

22. Ekblom's expert, Mr. Camuccio, testified that the boat lift would not create a navigational hazard. He visited the site by boat and reviewed the documentation submitted to the Department. His opinion did not change after reviewing Dr. Lin's drawings.

23. Ms. Hitchins opined that the lift would not cause a navigational hazard. She further opined that the lift would not interfere with navigation to and from the Padron side of the finger pier to the south, since the lift was located on the north side. Also, it would not preclude ingress and egress of vessels to Lot 26 to the northeast. She would not consider the boat lift to be any more intrusive than a boat moored in the same area. Any boat on Lot 26 would only need a small amount of clearance for ingress and egress.

24. Padron's navigation expert, Mr. Danti, concluded that the boat lift would be a navigational hazard in each of the six different scenarios Dr. Lin prepared. He concluded that the lift would preclude access to the northern side of the finger pier, would create a navigational hazard for the neighbor to the northeast on Lot 26, and would be a hazard for a jet ski's ingress and egress to the jet ski lift.

25. The mere fact that the lift may preclude access to the north side of the finger pier does not make it a navigational hazard. As Mr. Camuccio testified, inherently, a boat lift occupies some portion of navigable water that is potentially open for navigation, but it does not mean the lift is a navigation hazard. Notably, Ekblom has moored a boat on the north side of the pier for at least 12 years without incident or complaint.

26. The lift will not be a navigational hazard to Mr. Wright on Lot 26. Mr. Danti based his opinions on Dr. Lin's scaled drawings. But the specifications Dr. Lin used for the lift were too large, and Dr. Lin admitted that there was no way to verify whether he depicted the correct location of the riparian line. His drawings could inaccurately depict the proposed location of the boat lift by approximately two feet, seven inches. Mr. Danti admitted that he would need to recalculate his opinions if the proposed boat lift was up to two feet smaller in width than depicted.

27. Mr. Danti's opinion was also based on his conclusion that a jet ski would need a minimum of an eight-foot safety zone for ingress and egress. He would not change the size of the safety zone even if the conditions presented were changed; his opinion is based on the premise that a safety zone must be one-half of the beam of the vessel all around the vessel. However, Mr. Camuccio approximated the distance needed for any jet ski as four feet, which would give six inches on either side for clearance of other structures. He added that when docking a boat, the distance between the boat and the dock becomes zero at some point, because docking is nothing more than a controlled crash. Mr. Danti admitted that when docking a vessel, the circumstances can get tight, as opposed to the open ocean.

28. Even if the lift is installed to leave an eight-foot safety zone, any boat at Lot 26 will still have a small amount of room for clearance for ingress and egress.

d. Sole Dock

29. The Department considers a boat lift to be an associated structure under rule 40E-4.051(3)(b). Thus, the fact that Ekblom has a marginal dock on his property and a jet ski lift would not preclude a determination that the boat lift is exempt.

CONCLUSIONS OF LAW

30. Padron has presented sufficient evidence to demonstrate that her substantial interests could reasonably be affected by the exemption determination. See, e.g., Peace River/Manatee Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1084 (Fla. 2d DCA 2009).

31. The burden of showing entitlement to an exemption is on the applicant. See, e.g., Lardas v. Dep't of Env'tl. Prot., Case No. 05-0458, 2005 Fla. ENV LEXIS 229 (Fla. DOAH Aug. 24, 2005), adopted, OGC Case No. 04-1927, 2005 Fla. ENV LEXIS 228 (Fla. DEP Oct. 21, 1995). Because no permit is being issued by the Department, section 120.569(2)(p), Florida Statutes, does not apply.

32. Section 403.813(1)(b) provides that a permit is not required under chapter 373 for "activities associated" with the

installation of private docks, provided they meet certain conditions. Rule 40E-4.051(3) (b) implements this statutory exemption in relevant part as follows:

(b) . . . To qualify for this exemption, any such dock and associated structure:

1. Shall be used for recreational, non-commercial activities;
2. Shall be constructed or held in place by pilings, including floating docks, so as not to involve filling or dredging other than [sic] necessary to install the pilings;
3. Shall not substantially impede the flow of water or create a navigational hazard; and
4. . . . 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).

Padron contends that Ekblom fails to satisfy any of the foregoing criteria.

33. The unrefuted evidence supports a conclusion that Ekblom's proposed boat lift will be used for recreational, non-commercial purposes and will not involve more dredging and filling than that necessary to install the pilings.

34. Conflicting testimony was presented by the parties on the navigational hazard issue. However, the more persuasive evidence supports a conclusion that the boat lift will not cause a navigational hazard. Even if it arguably causes a slight

inconvenience, this does not rise to the level of a navigational hazard. See, e.g., Scully v. Patterson, Case No. 04-1799, 2005 Fla. Div. Adm. Hear. LEXIS 948 (Fla. DOAH April 14, 2005), adopted, OGC Case No. 04-1799 (Fla. DEP May 23, 2005). The rule criterion has been met.

35. Rule 40E-4.051(3)(b) does not prohibit the cradle lift solely because it is not physically attached to the finger pier. The Department considers the word "attached" to mean in close proximity to or a short step from and associated with a docking facility. This meaning is consistent with the definition of "attach," which means "to connect as an adjunct or associated part." Am. Heritage Dictionary (2d College ed., 1991). Otherwise, cradle lifts would not be exempt from permitting requirements, while elevator lifts would, leading to an unreasonable and absurd result. The Department's interpretation of the rule is a reasonable and logical one; the rule criterion has been satisfied.

36. Petitioner contends, however, that this case "is on all fours with and indistinguishable" from Rosenblum v. Zimmet, Case No. 06-2859, 2007 Fla. Div. Adm. Hear. LEXIS 577 (Fla. DOAH Oct. 23, 2007), adopted, OGC Case No. 06-1444, 2007 Fla. Div. Adm. Hear. LEXIS 866 (Fla. DEP Dec. 11, 2007), in which a request for a dock and lift exemption was denied. While there are some similarities in the two cases, the Rosenblum case is

not on all fours and indistinguishable from the instant case, as Padron claims. Like Ekblom and Padron, Rosenblum and Zimmet shared a common boundary between their two lots on a man-made canal. An existing dock extended from Rosenblum's property into the canal; both owners had access to the dock, Rosenblum on the north side and Zimmet on the south. Zimmet filed an application requesting an ERP exemption to install an eight-foot by 20-foot marginal dock with an elevator lift along his shoreline just south of, and perpendicular to, the existing dock. The proposed marginal dock and lift were designed to accommodate a boat that Zimmet intended to purchase. In denying the application, the Administrative Law Judge noted that if a boat of the size typically used in the canal (around 24.5 feet) was docked on the south side of the existing dock, it could "barely fit alongside Mr. Zimmet's boat," whether moored on the new marginal dock or the lift, and there would not be "a reasonable amount of clearance for navigating a boat" to or from the south side of the existing dock. Id. at *7. Likewise, if a typical sized boat were docked on the south side of the existing dock, "there would not be a reasonable amount of clearance for Mr. Zimmet to use his proposed [marginal] dock and lift." Id. The Department agreed that the project would create a navigational hazard and adopted the recommendation to deny the application.

37. But Ekblom does not intend to construct a new marginal dock and lift adjacent to an existing finger pier; he intends only to construct a cradle lift attached to the finger pier. His existing marginal dock will not be used to moor another boat, as one will not fit there. Moreover, the accepted evidence here shows that the proposed lift will not preclude ingress and egress to the finger pier, jet ski lift, or Lot 26, or otherwise create a navigational hazard within the meaning of the rule. The Rosenblum case is clearly distinguishable.

38. Ekblom has demonstrated by a preponderance of the evidence that his proposed boat lift meets the requirements of rule 40E-4.051(3) and is exempt from ERP requirements.

39. Ekblom's request for attorney's fees and costs under section 120.595(1), first made in his Proposed Recommended Order and not by motion as required by the statute, is denied.

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 approving its determination that Ekblom's application to install a boat lift is exempt from Department permitting requirements.

DONE AND ENTERED this 5th day of June, 2013, in
Tallahassee, Leon County, Florida.

D. R. Alexander

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 5th day of June, 2013.

ENDNOTES

¹ A marginal dock is a fixed or floating structure placed immediately contiguous and parallel to the shoreline. See Fla. Admin. Code R. 18-21.003(29).

² In 2002, an easement agreement was executed by Ekblom and the previous owner of Lot 28, which gives Ekblom access to the finger pier and the right to dock his vessel on the north side. When she purchased Lot 28 in 2011, Padron testified that she was made aware of the agreement and was told that Ekblom had a right to dock his boat on the north side of the pier. See Petitioner's Ex. 10, p. 8. Even so, Padron has contended, at least in her pleadings, that the easement does not give her neighbor access to the pier, but this issue must be resolved in circuit court, and not by an administrative tribunal. For purposes of deciding this case, the undersigned assumes that Ekblom has access to Padron's dock. In any event, proof of ownership of, or access to, a dock is not required in order to qualify for an exemption to construct a boat lift.

³ In 1995, the Department adopted rule 40E-4.051 by reference in rule 62-330.200(4)(b). Thus, the rule as written in 1995 is the controlling provision in this case. See § 120.54(1)(i)1., Fla. Stat.

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NOTICE OF RIGHT TO SUBMIT 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.