

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM B. SWAIM,

Petitioner,

vs.

Case No. 14-0448

SOUTH FLORIDA WATER MANAGEMENT
DISTRICT,

Respondent.

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RECOMMENDED ORDER

The final hearing in this case was held on March 19 and 20, 2015, in Tallahassee and West Palm Beach, Florida, by video-teleconference before Bram D.E. Canter, Administrative Law Judge with the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: William B. Swaim, pro se
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Delray Beach, Florida 33484

For Respondent: Alison L. Kelly, Esquire
South Florida Water Management District
3301 Gun Club Road, Mail Stop Code 1410
West Palm Beach, Florida 33406

STATEMENT OF THE ISSUE

The issue to be determined in this case is whether Petitioner's proposed activities qualify for the seawall construction exemption from permitting in section 403.813(1)(i), Florida Statutes (2014).

PRELIMINARY STATEMENT

On November 5, 2013, Petitioner submitted an exemption verification request to the District, requesting verification that his proposed activities qualify for five types of exemption from Environmental Resource Permit ("ERP") requirements. On December 5, 2013, the District issued exemption determination No. 131105-6, which determined that Petitioner's proposed activities qualified for the maintenance dredging exemption, but not the other four requested exemptions.

On December 30, 2013, Petitioner filed a petition for administrative hearing challenging the District's exemption determination. The District dismissed the initial petition and Petitioner filed an amended petition on January 10, 2014. The amended petition was referred to DOAH to conduct an evidentiary hearing.

On July 10, 2014, the District's Governing Board adopted a resolution which delegated authority to the Executive Director to take final action on requests for verification of exemptions. Petitioner moved to amend his petition again to include a claim of procedural error based on the after-the-fact delegation described above. Following a hearing on the motion, the Administrative Law Judge placed the case in abeyance and relinquished jurisdiction to the District to correct any procedural error. On September 24, 2014, the District issued a

revised exemption determination, but it still concluded that Petitioner only qualified for the maintenance dredging exemption.

Before the final hearing, Petitioner withdrew his challenge of the District's denial of the requested exemptions except with respect to the seawall construction exemption. The case proceeded to hearing solely on Petitioner's challenge to the District's determination that Petitioner did not qualify for the seawall construction exemption.

At the final hearing, official recognition was taken of Florida Administrative Code Rules 40E-4.051 and 62-312.050; chapters 40E-4, 62-302, 62-330, and 62-340; and the ERP Applicant's Handbook, Volume I and II. Joint Exhibit 1 was admitted into evidence.

Petitioner testified on his own behalf. Petitioner's Exhibits 2, 3, 9-12, 15-16, 23, 26, 27, 28, and 29, were admitted into evidence. Petitioner's Exhibits 3, 27, 28, and 29 were ruled hearsay and admitted only to supplement or explain non-hearsay evidence or evidence for which a hearsay exception applies. Petitioner's Exhibit 47 was placed in the record only as a proffer.

The District presented the testimony of Rod Maddox, P.S.M., who was accepted as an expert in surveying and mapping; Richard Barnes, P.S.M., who was accepted as an expert in

surveying and mapping; Patrick Ganley; Dr. Jeffrey Eder; Robert Schaffer, who was accepted as an expert in mapping; Robert Hopper, R.L.A., P.W.S., who was accepted as an expert in wetland delineation, wetland mitigation and wetland ecology; and Robert Robbins, P.W.S., who was accepted as an expert in saltwater ecology, wetland ecology, and wetland mitigation. District Exhibits 1-3, 6-11, 13-32, 39-44, and 52 were admitted into evidence.

The five-volume Transcript of the final hearing was filed with DOAH. The parties filed proposed recommended orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. The District is a multi-purpose water management district with its principal office at 3301 Gun Club Road, West Palm Beach, Florida. It has been granted powers and assigned duties under chapter 373, Florida Statutes, to regulate construction activities in wetlands and other surface waters.

2. Petitioner William B. Swaim is the contract purchaser of real property located at Section 22, Township 45 South, Range 43 East, Palm Beach County Parcel Identification number 46-43-45-22-00-005-0020, in the Town of Ocean Ridge, Palm Beach County ("the property" or "Petitioner's property").

3. The western side of the property contains a healthy stand of red mangroves. It is inundated on high tides.

4. The eastern portion of the property is beneath the open waters of Spanish Creek. This submerged portion contains productive benthic habitat for a number of fish, invertebrates, oysters, conchs, clams, mussels, barnacles, and crabs.

5. The Department of Environmental Protection could not determine whether Spanish Creek was navigable at the date of statehood (1845) and, therefore, is subject to a claim of State ownership under chapter 253, Florida Statutes, as "sovereignty submerged lands."

6. Petitioner did not present competent evidence that all of the land upon which the proposed project would be constructed is contained within the property which he has contracted to purchase. Petitioner showed his title would extend to the centerline of Spanish Creek, but he did not establish where the centerline is located.

7. Petitioner's evidence was not sufficient to show that he has a colorable claim to all of the open water area that he proposes to wall off and fill.

The Proposed Project

8. In his request for exemption verification, Petitioner identified the following proposed development activities:

(1) construction of approximately 950 feet of batter pile

concrete seawall around three sides of the approximate boundaries of the property; (2) filling within the seawalls to an approximate elevation of 8.0 feet above sea level with offsite fill; and (3) construction of an access road to the south of the property.

9. Petitioner later modified his proposal to construct 1,117 feet of batter pile concrete and steel sheet seawall and to fill within the seawalls to an approximate elevation of 6.0 feet above sea level. At the final hearing, Petitioner withdrew his plan to place riprap on the outside of the eastern seawall. Petitioner still proposes to place 300 feet of riprap along the western boundary of the property.

The Seawall Construction Exemption

10. Section 403.813(1)(i) provides an exemption from permitting for the following activities:

The construction of private docks of 1,000 square feet or less of over-water surface area and seawalls in artificially created waterways where such construction will not violate existing water quality standards, impede navigation, or affect flood control. This exemption does not apply to the construction of vertical seawalls in estuaries or lagoons unless the proposed construction is within an existing manmade canal where the shoreline is currently occupied in whole or part by vertical seawalls.

Whether Petitioner Proposes to Construct Seawalls

11. The term "seawall" is not defined in the statute. It is defined in section 2.0(a)91 of the Applicant's Handbook as "a man-made wall or encroachment, except riprap, which is made to break the force of waves and to protect the shore from erosion."

12. The District's definition of "seawall" is similar to its dictionary definition as "a wall or embankment to protect the shore from erosion or to act as a breakwater." Webster's New Collegiate Dictionary at 1035 (1979).

13. Petitioner's proposed project is not intended to protect a shore from erosion. The property has no shore. Petitioner's project is more accurately described as construction of retaining walls to form a frame within which to place fill dirt so that about three acres of wetlands and open water can be transformed into uplands. Petitioner's purpose is to create a buildable residential lot.

14. Petitioner's project is not the construction of seawalls. Therefore, the proposed seawalls will be referred to hereafter as walls.

Whether Spanish Creek is an Artificially Created Waterway

15. The term "artificially created waterway" is not defined in section 403.813(1)(i) or in the rules of the District. However, the term "artificial waters" is defined in section 2.0(a)10 of the Applicant's Handbook as "bodies of water that

were totally excavated from uplands, do not overlap historic wetlands or other surface waters, and were not created as a part of a mitigation plan.”

16. The District interprets the term “artificially created waterway” in section 403.813(1)(i) as having the same meaning as “artificial waters”; that is, it does not include natural waterbodies that have been dredged.

17. The District conducted an extensive review of over 160 years of mapping data, including certified historic maps from the 1800s, aerial photography, the National Wetlands Inventory database, topographic and hydrographic data, soil surveys and maps, and historic photographs. The evidence clearly establishes that Spanish Creek is a naturally-occurring waterbody, having appeared on historic documents since at least 1872.

18. Some dredging was conducted in Spanish Creek, probably in the 1950s or 1960s. The western portion of Petitioner’s property where the red mangroves are located was not dredged. The preponderance of the evidence indicates that the property once included a larger area of shallow marsh or mangrove vegetation and a smaller area of open water, but dredging decreased the area of vegetated wetlands and increased the area of open water.

19. Spanish Creek does not meet the District's definition of "artificial waters" because it is not totally excavated from uplands.

20. Spanish Creek meets the definition of "stream" in section 2.0(a)101 of the Applicant's Handbook, which is "any river, creek, slough, or natural watercourse in which water usually flows in a defined bed or channel." The definition includes a statement that "[t]he fact that some part of the bed or channel shall have been dredged or improved does not prevent the watercourse from being a stream."

21. Petitioner's reference to U.S. Army Corps of Engineers characterizations of waters in the area as "residential canals" is not controlling, nor persuasive. Spanish Creek is not a canal. Spanish Creek is a natural waterbody, which has been artificially widened by dredging.

22. Petitioner argues that the plain meaning of "artificially created waterway" applies to Spanish Creek, but "artificially created" does not have the plain meaning of being artificially altered. Spanish Creek was altered by dredging. It was not created by dredging. It was widened by the dredging and probably deepened, at least initially, but no evidence was presented to compare historical and current depths.

23. Petitioner suggests that Spanish Creek was not a waterway before it was dredged based on his unproven assumption

that Spanish Creek was only navigable after it was dredged. However, the first dictionary entry for "waterway" is "a way or channel for water." Webster's New Collegiate Dictionary, at 1314. Spanish Creek was a way or channel for water before it was dredged.

24. Spanish Creek is not an artificially created waterway.

Whether the Project Would Violate Water Quality Standards

25. Other than submitting a turbidity control plan that Petitioner adapted from a plan he found in the District files for another project, Petitioner did not address water quality issues in his request for exemption verification. At the final hearing, Petitioner did not present competent evidence regarding the potential water quality impacts associated with his proposed project.

26. Petitioner is proposing to construct an access road that will be located on properties owned by Palm Beach County and Spanish Creek, LLC, which currently consist of mangrove wetlands, but he has not obtained their permission for the construction.

27. The area contains muck soils, which would have to be removed to construct the road. Petitioner did not address with competent evidence the potential water quality impacts associated with the muck removal.

28. Petitioner stated that if he is unable to transport the muck and fill material over the access road, he will use a barge

and tug boat. Because of the shallow depth of Spanish Creek, these vessels would likely disturb the submerged soils and the organisms that live in or use these soils.

29. Petitioner's proposed project would extend a box-shaped land form into the open waters of Spanish Creek that would affect water currents and sediment movement. Tidal flushing would be impeded. Erosion would likely be caused by currents and waves reflecting off and flowing around the proposed walls. Shoaling would likely occur.

30. Petitioner did not present competent evidence that the proposed construction activities can be conducted without causing violations of state water quality standards. The preponderance of the evidence indicates that Petitioner's proposed activities would violate state water quality standards for turbidity, dissolved oxygen, and species diversity in the area.

Whether the Project Would Impede Navigation

31. The proposed project would cause a substantial narrowing of Spanish Creek, leaving about 75 feet of open water between the eastern wall of Petitioner's property and the Wellington Arms Condominium seawall.

32. Wellington Arms has docks which extend out 34 feet from its seawall. The docks are currently being used for boats that extend beyond the end of the docks. Less than 40 feet would

separate the vessels moored at Wellington Arms from Petitioner's proposed eastern wall.

33. If Petitioner's proposed project were built, maneuvering a boat in and out of the docks at Wellington Arms or between the docks and Petitioner's proposed eastern wall would be difficult. It would be unsafe in windy conditions.

34. The proposed project would impede navigation.

Whether the Proposed Project Would Affect Flood Control

35. The District presented evidence to support its contention that the proposed project would affect flood control, but the evidence was not persuasive. The property is surrounded by waters of the Intracoastal Waterway and Atlantic Ocean and the District's evidence did not adequately explain how the project could have more than an insignificant effect on these dominant forces which determine water levels in the area.

Whether Petitioner Proposes Only Backfilling

36. Rule 62-330, entitled "Exempt Activities," is applicable to all exemption requests. Rule 62-330.051(12) (a) addresses the exemption for construction of seawalls and states that the exemption includes "only that backfilling needed to level the land behind seawalls."

37. Petitioner proposes to fill approximately three acres behind the walls. Currently, there is no land (uplands) behind the proposed walls to level. The purpose of the fill is not to

level land behind the walls. The purpose of the fill is to create a buildable lot.

38. Petitioner does not know how much fill is required to stabilize the walls. Less than three acres of fill is required.

39. Petitioner's proposed project does not include only that backfilling needed to level the land behind the walls.

CONCLUSIONS OF LAW

40. An administrative hearing held pursuant to sections 120.569 and 120.57(1), Florida Statutes, is a de novo proceeding designed to formulate final agency action. McDonald v. Dep't of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

41. Because Petitioner is the party asserting the affirmative of the issue of the proceeding--that he qualifies for the seawall construction exemption--he has the burden of ultimate persuasion. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

42. Petitioner must prove the material facts that establish his entitlement to the exemption by a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.

43. An agency's interpretation of the statutes and rules it administers is entitled to deference and should be upheld unless it is clearly erroneous. See Suddath Van Lines, Inc. v. Dep't of Env'tl. Prot., 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

44. The District's interpretation of the statutory term "artificially created waterways" to exclude natural waterbodies that have been dredged is a reasonable one. It furthers the legislative intent reflected in all of the exemptions created in section 403.813 that the exemptions apply to activities which will have little or no adverse effect on natural resources.

45. Whether Spanish Creek contains state sovereign submerged lands is not a controlling factor in determining whether a proposed seawall qualifies for an exemption under section 403.813(1)(i).

46. Petitioner contends that the seawall construction exemption only requires him to provide turbidity controls. There is no such limitation in the statute. All state water quality standards are applicable.

47. Petitioner's proposed project does not qualify for the exemption for seawall construction in section 403.813(1)(i) because (1) it does not propose seawalls, but, rather, retaining walls to hold fill material; (2) the project is not in an artificially created waterway; (3) the project would violate state water quality standards; (4) the project would impede navigation; and (5) the project includes more backfilling than needed to level the land behind the walls.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the District enter a Final Order determining that Petitioner's proposed development activities do not qualify for the seawall construction exemption from permitting under section 403.813(1)(i), Florida Statutes.

DONE AND ENTERED this 14th day of May, 2015, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
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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.