

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALLEN SHANOSKY, CYNTHIA
SHANOSKY, AND MICHAEL STECK,

Petitioners,

vs.

Case No. 18-1940

TOWN OF FORT MYERS BEACH AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a hearing
in this case on August 23, 2018, in Fort Myers Beach, Florida.

APPEARANCES

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For Respondent: John S. Turner, Esquire
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For Respondent: Carson Zimmer, Esquire
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STATEMENT OF THE ISSUE

The only issue to be resolved is whether a 440-square-foot dock to be constructed by the Town of Fort Myers Beach (Town) creates a navigational hazard and therefore cannot qualify for a regulatory exemption pursuant to section 403.813(1)(b), Florida Statutes (2018).

PRELIMINARY STATEMENT

By letter dated July 3, 2017, the Department of Environmental Protection (Department) informed the Town that it qualified for an exemption to build a dock at the north end of Hercules Avenue, in the Matanzas Pass, a Class II Outstanding Florida Water, and that it qualified for automatic consent by rule to use sovereign submerged lands.

On March 8, 2018, Petitioners, Allen and Cynthia Shanosky and Michael Steck, who own property adjacent to the proposed dock, filed their Verified Petition for Formal Administrative Hearing (Petition) challenging the agency's determination. The case was referred by the Department to the Division of Administrative Hearings for the purpose of conducting a hearing. On April 27, 2018, the case was transferred from former Administrative Law Judge Canter to the undersigned. The Town's Motion to Dismiss the Petition on the ground it was untimely filed was denied by Order dated May 14, 2018.

At the hearing, Petitioners testified on their own behalf and jointly presented the testimony of one witness. Also, Petitioners' Exhibits 1 through 9 were accepted in evidence. The Town presented the testimony of three witnesses. Town Exhibits 1 through 3 and 5 through 10 were accepted in evidence. The Department presented one witness. Department Exhibits 1 and 2 were accepted in evidence.

A one-volume Transcript of the hearing was prepared. Proposed findings of fact and conclusions of law were filed by the parties on November 5, 2018, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The Parties

1. The Department is the state agency having jurisdiction over the construction and permitting of docks. The Department also acts as the staff to the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees) concerning the use of sovereign submerged lands owned by the Board of Trustees.

2. The Town is a small municipal corporation located on a barrier island (Estero Island) just west-southwest of the City of Fort Myers in Lee County. Matanzas Pass, designated by the Department as a Class II Outstanding Florida Water, lies between Estero Island and the mainland.

3. The Shanoskys own property at 177 Hercules Drive, Fort Myers Beach. The parcel lies on the north side of the proposed dock. Their home was constructed in 1952, and they are the second owners. An L-shaped dock extending from the shoreline into Matanzas Pass was built by the first owner in the 1970s and still remains in place. The dock is approximately the same length (49 feet) as the pier proposed by the Town.

4. Michael Steck owns property on the south side of the proposed dock at 190 Hercules Drive, Fort Myers Beach. The parcel was purchased only for boating purposes, as there is no residence on the property. An L-shaped dock extending into Matanzas Pass was in place when he purchased the property in 2001. His dock extends slightly further from the shoreline into the water than the proposed new dock.

B. Background

5. Since at least 1944, or long before the Town was incorporated, a dock extended from the public right-of-way at the end of Hercules Drive into Matanzas Pass. By 1953, private docks were located on what are now Petitioners' properties, directly adjacent to the public dock. Due to age and weather-related factors, the public dock deteriorated over time and was completely removed by the Town in October 2015.

6. The width of Matanzas Pass from shoreline to shoreline at that point is more than 750 feet, while the navigational channel is more than 300 feet wide.

7. Over the years, the old Town dock changed configurations several times. In 2002, the dock was extended to 49 feet beyond the bulkhead of the shoreline and remained unchanged until its removal in 2015.

8. After the dock was removed, a number of residents urged the Town to build a new dock that will be used for fishing and viewings. Boats will not be moored at the pier. Except for Petitioners, all residents in the area support that effort.

9. Besides multiple neighborhood meetings, several public meetings were conducted by the Town Council concerning the construction of a new dock. On May 22, 2017, Mr. Baker, the former public works director, sent all area residents a letter, along with a preliminary drawing of the dock. Town Ex. 2. The letter advised residents that they should contact him if they had any questions or concerns.

10. Mr. Steck resides in Illinois and only spends two or three weeks each year in Florida. He did not receive a copy of the letter. The Shanoskys' primary residence at that time was in New Jersey. Ms. Shanosky testified that they received a copy of the letter "almost in June, [or] the very end of May." On June 23, 2017, Ms. Shanosky emailed Mr. Baker and stated that

they just received the Town's letter and they "DO NOT approve these plans that were outlined in your May 22, 2017 letter to us." Town Ex. 1.

11. On May 24, 2017, the Town authorized Mr. Kincaid, its engineering consultant, to file an application with the Department. On June 17, 2017, Mr. Kincaid submitted to the Department a request for verification of an exemption to perform the following activity:

To install a 440 square foot pier at North end of Hercules Avenue, Town of Fort Myers Beach, Florida 33931 in Matanzas Pass, Class II Outstanding Florida Waters, Unclassified for shellfish harvesting, Lee County.

12. Based on the information provided in the application, and using the criteria in section 403.813(1)(b), on July 3, 2017, the Department's Fort Myers District Office issued a letter informing the Town that pursuant to section 403.813(1)(b) and Florida Administrative Code Rule 62-330.051(5)(b), the proposed activity qualifies for an exemption from the need to obtain a regulatory permit under Part IV of chapter 373, Florida Statutes. Dep't Ex. 1. Pertinent to this case was a determination by the Department that the proposed dock would not create a navigational hazard.

13. The letter further informed the Town that while the proposed activity is located on sovereign submerged lands owned

by the Board of Trustees and requires authorization to use those lands, the activity qualifies for an automatic consent by rule pursuant to rule 18-21.005(1)(b). That action is not in dispute.

14. The Department's letter did not require the Town to publish notice of the verification or to provide separate written notice to the adjoining property owners. Consequently, there is no evidence that notice of the Department's action was published or given to Petitioners. They did not learn of the verification until February 15, 2018, when Ms. Shanosky performed a Google search and learned that an application had been filed with the Department and an exemption had been verified. She spoke by telephone that day with Ms. Mills, the Department's program permitting administrator in the Fort Myers office, who confirmed this action.

15. On February 21, 2018, Ms. Shanosky emailed Ms. Mills and expressed her objections to the dock. These objections included not only navigational concerns, but also a fear that, like the old dock, the new dock would continue to be used by "nighttime partiers with their litter and noise."^{1/} By email dated February 21, 2018, Ms. Mills provided Ms. Shanosky with instructions on how to request a hearing. On February 23, 2018, Ms. Shanosky informed Mr. Steck of the Department's action. Collectively, they filed their Petition on March 8, 2018.

16. The Petition alleges the dock does not qualify for an exemption under section 403.813(1)(b) because: (a) it will create a navigational hazard by impeding Petitioners' ability to access their own docks, and (b) it will create a navigational hazard in the open waters that are contiguous to their docks. There was no evidence regarding the open waters allegation, and, therefore, only the first allegation remains in issue. At hearing, Petitioners testified that if the Town would agree to shorten the length of the dock by an undisclosed number of feet, it would resolve the dispute.

C. The Project

17. The public right-of-way at the end of Hercules Drive is approximately 47 feet wide. Town Ex. 10. Because the Town has less than 65 linear feet of shoreline on its right-of-way, the requirement that the new dock be at least 25 feet from the riparian lines of adjoining property owners does not apply. See Fla. Admin. Code R. 62-330.051(5)(b)4.

18. A seawall runs along the shoreline in front of Petitioners' properties, from which their docks extend into the water. Until recently, there was no seawall in front of the Town right-of-way. As a part of a separate stormwater project, the Town has backfilled the area between Hercules Drive and where the adjacent seawall ends and constructed a new seawall to fill in the gap.

19. The Town has attempted to center the new dock in the middle of its property. A 30-foot concrete sidewalk will be built from Hercules Drive to the new seawall. The dock will extend approximately 49 feet from the seawall into Matanzas Pass, which corresponds to the length of the old dock. The new dock is comparable in size and consistent in design with other private docks in the area. It does not extend forward of existing structures owned by Petitioners into the Matanzas Pass channel.

20. The first 25 feet of the dock will be six feet wide, while the remaining 24 feet will have a 12-foot, 4-inch wide platform, with handrails. Although the new dock substantially replicates the old dock, the square footage of the terminal platform has been reduced.

21. The distance between the new pier and the closest part of the Shanosky dock is 53 feet, while the closest part of the Steck dock is 52 feet. Except for being a foot or two closer to the Shanosky side, this distance corresponds to the separation which existed before the old dock was removed.

22. The average speed of the current in the area where the dock will be constructed is 1.45 miles per hour. Except in stormy weather or when waters are extremely rough, the current will not create a navigational concern for Petitioners when accessing their docks.

D. Petitioners' Concerns

23. The Shanoskys currently moor a twin-engine, 24-foot jet boat at their dock, and their children use two personal watercrafts. The personal watercrafts will not be impacted in any manner by the new dock. Mr. Shanosky, a self-described recreational boater, is "entertaining the thought" of purchasing even a larger boat, a 48-foot trawler, which would require him to remove one lift on his dock.

24. Mr. Shanosky testified that before the old dock was removed, mooring his boat was "extremely difficult, challenging, and hazardous," and the new dock will make access "dangerous." But at the same time he admitted that during the 13 years the old dock with the same dimensions was in place, he experienced only one incident, and this allusion was caused by a "hard current," resulting in the boat striking his own dock. There is no evidence that during that period, he voiced any concerns to the Town regarding a navigational hazard.

25. According to Ms. Shanosky, if the new dock is built, it will be "much harder" to dock their boat, especially if people are fishing on the pier.

26. Mr. Steck describes himself as a "recreational boater and racer but not a professional." He currently owns a 44-foot Trimaran, which has an eight-foot bowsprit and is approximately 30 feet wide. Pet'r Ex. 6. Although the boat has been moored in

Chicago for the last few years, he intends to ship it to Florida at some time in the future.

27. Mr. Steck's boat has a small engine (27 horsepower) and is very light. He steers with a rudder, which requires him to have speed when docking his vessel. Without speed, he cannot steer. If the new dock is constructed, he testified that it will be a "nerve racking" experience to dock his boat on the inside of his pier because of the narrow space between the two docks. However, when he purchased a 44-foot vessel years ago, he did so with the knowledge of the old dock, and that he had no more than 52 feet or so of space between his dock and the Town's dock.

28. Mr. Steck has docked his boat on both the inside and outside of his dock. Even when the old dock was in place, he never experienced an allision. Mr. Steck agrees that if he docks on the outside or seaward part of the pier, there will be no navigational issues.

29. According to Petitioners' expert, there is no "margin of safety" with the new dock, and if the mariner's calculations are slightly off, or there is a sudden gust of wind, it would "very likely" cause a collision with the mariner's dock or the new Town pier. However, the record shows that between 2002 and 2015, with the same margin of safety, except for one incident during a sudden "hard current," neither Mr. Shanosky nor Mr. Steck experienced an allision.

30. The Town's expert established that the location of the new dock meets industry standards for boat-maneuvering requirements between a structure and the opening of a slip perpendicular to the structure. The standards call for a minimum space (or width) of 1.5 times the vessel's length that would be moored to the slip. This space between the structure and the slip is known as the "fairway."

31. The fairway for the Shanosky's 24-foot boat meets or exceeds industry standards. If moored on the inside of his dock, Mr. Steck's 44-foot vessel with an eight-foot bowsprit will encroach on the Town's riparian right-of-way.^{2/} To avoid encroachment, he must dock his boat on the outside of the pier, which extends slightly further into the water than the new Town dock. When docked in this manner, the fairway meets industry standards and will not cause any interference.

32. From 2002 until October 2015, the old dock was the same length and size as the proposed dock. Therefore, Petitioners will face the same navigational concerns, no more or no less, than they faced during that 13-year period.

33. While it may create an inconvenience for Petitioners, or cause them to be more cautious during ingress and egress from their docks, the new dock will not create a navigational hazard.

CONCLUSIONS OF LAW

34. The facts demonstrate that Petitioners have standing under chapter 120 to initiate this proceeding.

35. All parties agree that the letter of exemption is a written determination pursuant to chapter 403 and is subject to the burden of proof requirements in section 120.569(2)(p). Therefore, a third party challenging the verification has the burden "of ultimate persuasion" and the burden "of going forward to prove the case in opposition to the . . . [verification]." If the third party fails to carry its burden, the applicant prevails by virtue of its prima facie case.

36. Issuance of the verification is dependent upon there being reasonable assurance that the proposed dock will meet applicable statutory and regulatory standards.

37. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." See Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuing a letter of verification have been satisfied.

38. As previously found, while the new dock may have minor adverse effects on navigation and create some inconvenience, it does not create a navigational hazard. See, e.g., Woolshlager v. Rockman, Case No. 06-3296 (Fla. DOAH May 7, 2007; FDEP June 20,

2007); Scully v. Patterson, Case No. 05-0058 (Fla. DOAH Apr. 14, 2005; FDEP May 12, 2005); Archipelago Comm. Ass'n, Inc. v. Raab, Case No. 98-2430 (Fla. DOAH Mar. 1, 2000; FDEP Apr. 13, 2000).

39. The Town made its prima facie case of entitlement to an exemption from the requirement that it needed a permit to construct the dock. Therefore, the burden of ultimate persuasion is on Petitioners to prove their case in opposition to the verification by a preponderance of the competent and substantial evidence. Having failed to do so, the Town must prevail.

40. In summary, by a preponderance of the evidence, the Town has provided reasonable assurance that the proposed activity will not impede navigation or create a navigational hazard in the area in and around Petitioners' docks.

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 reaffirming that the Town is entitled to (1) an exemption from permitting requirements to construct a new dock, and (2) automatic consent by rule to use sovereign submerged lands.

DONE AND ENTERED this 20th day of November, 2018, in
Tallahassee, Leon County, Florida.



D. R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of November, 2018.

ENDNOTES

^{1/} The noise and litter are legitimate concerns. However, these concerns should be addressed by the Town through law enforcement measures. They play no role in the regulatory process at hand.

^{2/} The Town points out that if Mr. Steck's vessel encroaches on the Town's riparian right-of-way, this will violate the Town's Land Development Code. While this may be true, it is of no concern in this proceeding.

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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.