

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

JAMES ZUKOWSKI,

Petitioner,

vs.

Case No. 21-2761

FLORIDA FISH AND WILDLIFE  
CONSERVATION COMMISSION,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on November 8, 2021, via Zoom teleconference, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioner: James Zukowski, pro se  
14449 Manchester Pike Road  
Christiana, Tennessee 37037

For Respondent: Brandy Elaine Elliott, Esquire  
Florida Fish and Wildlife Conservation  
Commission  
Farris Bryant Building  
620 South Meridian Street  
Tallahassee, Florida 32399-1600

STATEMENT OF THE ISSUE

The issue is whether the Florida Fish and Wildlife Conservation Commission (“Respondent” or “the Commission”) correctly determined that a vessel owned by James Zukowski (“Petitioner” or “Mr. Zukowski”) was a “derelict vessel,” or an “abandoned vessel,” within the meaning of section

823.11, Florida Statutes,<sup>1</sup> and, therefore, subject to the provisions of sections 823.11, 705.101(3), 376.15(3)(a), and 705.103, Florida Statutes.

PRELIMINARY STATEMENT

On June 23, 2021, the Commission mailed to Mr. Zukowski notice of his derelict vessel, a “white, 21-foot, Catalina Yacht sailing vessel with Florida Registration Numbers FL9545EA displayed HIN of CTYH0631M82B.” Mr. Zukowski acknowledged receipt of the documents related to a derelict vessel determination on July 7, 2021.

Through an Election of Rights form and a Petition for Administrative Proceeding, each dated August 27, 2021, Mr. Zukowski requested an administrative hearing. In his Petition, Mr. Zukowski stated that the vessel was derelict at the time of notification but that he had since effected repairs that rendered the vessel seaworthy. Mr. Zukowski requested that “all actions be dropped” based on his assertion that the vessel was no longer derelict.

On September 13, 2021, the Commission referred the case to DOAH for the assignment of an ALJ and the conduct of formal hearings. The case was assigned to ALJ Suzanne Van Wyk.

The final hearing was scheduled for October 26, 2021. By Order dated October 22, 2021, the hearing was canceled because Petitioner, who is in Tennessee, was having difficulty coordinating between his Florida contractor and the Commission.

The hearing was rescheduled for November 8, 2021. Due to ALJ Van Wyk’s illness, the case was reassigned to the undersigned, who convened and completed the hearing on the scheduled date.

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<sup>1</sup> Unless otherwise noted, all references to the Florida Statutes are to the 2021 edition.

At the hearing, Mr. Zukowski testified on his own behalf. Mr. Zukowski offered no exhibits into evidence.

The Commission presented the testimony of Officer Michael Alvarez. The Commission's Exhibits 1 through 4 were admitted into evidence.

No transcript of the final hearing was filed with DOAH. Neither party filed a proposed recommended order.

#### FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. Mr. Zukowski is the last registered owner of a 21-foot Catalina Yacht sailboat, registration number FL9545EA ("sailboat"), found in the public waters of Monroe County, Florida.

2. The Commission is empowered to remove, or cause to be removed, derelict vessels from the waters of Florida. §§ 376.15(3)(a) and 823.11(3), Fla. Stat. A vessel is considered to be "derelict" if it is "[i]n a wrecked, junked, or substantially dismantled condition upon any waters of this state." § 823.11(1)(b), Fla. Stat.

3. Officer Michael Alvarez is a sworn law enforcement officer who works for the Commission as a derelict vessel patrol officer for the Middle Keys.

4. On June 23, 2021, Officer Alvarez discovered the vessel in Cow Key Channel, near Key West. In his notice to the owner, Officer Alvarez described the state of the vessel:

The above stated vessel is wrecked and substantially dismantled upon public waters of the state and state submerged lands. This vessel meets the definition of substantially dismantled since the mast is disassembled and not operational, there are no sails nor rigging. With that being said, the outboard present would be the only means of

propulsion. This outboard is not operational due to neglect and the propeller being wrapped in anchor line, rendering it useless. This vessel meets the definition of wrecked because it is hard aground and cannot extract itself without mechanical assistance.

5. At the hearing, Officer Alvarez testified that he found the vessel resting on the bay bottom, filled with water. The mast was lying on the deck. A mounted trolling motor was the only means of propulsion, but it was inoperable due to the lack of a fuel line. The motor's propeller was fouled in anchor line.

6. On June 23, 2021, Officer Alvarez took several photographs of the vessel that confirmed his written and oral descriptions.

7. By searching the title on the vessel, Officer Alvarez ascertained that Mr. Zukowski was the registered owner. On June 23, 2021, Officer Alvarez sent a Notification of Rights packet and a Derelict Vessel Notification Letter to Mr. Zukowski.

8. On July 7, 2021, Mr. Zukowski acknowledged in writing that he received the materials from Officer Alvarez. On the same date, Mr. Zukowski telephoned Officer Alvarez. Mr. Zukowski stated that he had sold the vessel a year ago but had no bill of sale or other proof. He acknowledged that he was responsible for the vessel. Mr. Zukowski told Officer Alvarez that he would request an administrative hearing but that he expected to have the vessel removed before any hearing date.

9. Officer Alvarez and Mr. Zukowski have remained in contact as the latter has worked to remove the vessel. Mr. Zukowski has contracted with a local man, Luis Trevino, to take control and render the vessel operable. Officer Alvarez noted that by mid-September, the water had been pumped out of the vessel and that it was floating, meaning that it was no longer considered "wrecked" under the statutory definition.

10. However, Officer Alvarez testified that the vessel remained “derelict” because it still lacked any means of propulsion or steering. Despite Mr. Zukowski’s statements that Mr. Trevino had attached an outboard motor to the vessel, Officer Alvarez discovered that the only motor mounted on the boat was the trolling motor he had originally seen on June 23, 2021.

11. On October 6, 2021, Officer Alvarez returned to the vessel and found it in essentially the same condition. It was floating and anchored in a secure fashion, but still had no means of propulsion or steering.

12. At the hearing, Mr. Zukowski reiterated his intentions to make the vessel operable and remove it from its current location. He conceded Officer Alvarez’s point that Mr. Trevino appears to lack experience in the kind of work he is attempting to perform. Mr. Zukowski stated that he nonetheless had confidence that the vessel would be removed before the deadline for this Recommended Order and that final agency action by the Commission would be unnecessary.

13. For its part, the Commission stated at the hearing that it would be happy to drop the case if Mr. Zukowski could indeed remove the vessel before the issuance of a Recommended Order. As of the writing of this Recommended Order, the undersigned has received no notice from the Commission or Mr. Zukowski that the situation has changed since the hearing date.

#### CONCLUSIONS OF LAW

14. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

15. Section 376.15 provides, in pertinent part:

(1) As used in this section, the term:

(a) “Commission” means the Fish and Wildlife Conservation Commission.

\* \* \*

(2)(a) It is unlawful for any person, firm, or corporation to leave any derelict vessel as defined in s. 823.11 upon the waters of this state. For purposes of this paragraph, the term “leave” means to allow a vessel to remain occupied or unoccupied on the waters of this state for more than 24 hours.

\* \* \*

(3)(a) The commission, an officer of the commission, or a law enforcement agency or officer specified in s. 327.70 may relocate, remove, store, destroy, or dispose of or cause to be relocated, removed, stored, destroyed, or disposed of a derelict vessel as defined in s. 823.11 from waters of this state as defined in s. 327.02. All costs, including costs owed to a third party, incurred by the commission or other law enforcement agency in the relocation, removal, storage, destruction, or disposal of any abandoned or derelict vessel are recoverable against the owner of the vessel or the party determined to be legally responsible for the vessel being upon the waters of this state in a derelict condition. The Department of Legal Affairs shall represent the commission in actions to recover such costs.

16. Section 327.02, Florida Statutes, provides, in pertinent part:

(44) “Sailboat” means a vessel whose sole source of propulsion is the wind.

\* \* \*

(46) “Vessel” is synonymous with boat as referenced in s. 1(b), Art. VII of the State Constitution and includes every description of watercraft, barge, and airboat, other than a seaplane on the water, used or capable of being used as a means of transportation on water.

(47) “Waters of this state” means any navigable waters of the United States within the territorial

limits of this state, the marginal sea adjacent to this state and the high seas when navigated as a part of a journey or ride to or from the shore of this state, and all the inland lakes, rivers, and canals under the jurisdiction of this state.

17. “Abandoned property” includes derelict vessels as defined in section 823.11. § 705.101(3), Fla. Stat.

18. Section 823.11(1)(b) defines “derelict vessel” as follows:

(b) “Derelict vessel” means a vessel, as defined in s. 327.02, that is:

1. In a wrecked, junked, or substantially dismantled condition upon any waters of this state.

a. A vessel is wrecked if it is sunken or sinking; aground without the ability to extricate itself absent mechanical assistance; or remaining after a marine casualty, including, but not limited to, a boating accident, extreme weather, or a fire.

b. A vessel is junked if it has been substantially stripped of vessel components, if vessel components have substantially degraded or been destroyed, or if the vessel has been discarded by the owner or operator. Attaching an outboard motor to a vessel that is otherwise junked will not cause the vessel to no longer be junked if such motor is not an effective means of propulsion as required by s. 327.4107(2)(e) and associated rules.

c. A vessel is substantially dismantled if at least two of the three following vessel systems or components are missing, compromised, incomplete, inoperable, or broken:

(I) The steering system;

(II) The propulsion system; or

(III) The exterior hull integrity.

Attaching an outboard motor to a vessel that is otherwise substantially dismantled will not cause

the vessel to no longer be substantially dismantled if such motor is not an effective means of propulsion as required by s. 327.4107(2)(e) and associated rules.

2. At a port in this state without the consent of the agency having jurisdiction thereof.

3. Docked, grounded, or beached upon the property of another without the consent of the owner of the property.

19. Section 705.103(4) provides, in pertinent part:

(4) The owner of any abandoned or lost property, or in the case of a derelict vessel, the owner or other party determined to be legally responsible for the vessel being upon the waters of this state in a derelict condition, who, after notice as provided in this section, does not remove such property within the specified period shall be liable to the law enforcement agency, other governmental entity, or the agency's or entity's designee for all costs of removal, storage, and destruction of such property, less any salvage value obtained by disposal of the property. Upon final disposition of the property, the law enforcement officer or representative of the law enforcement agency or other governmental entity shall notify the owner, if known, of the amount owed....

20. Because the Commission is asserting that Mr. Zukowski's sailboat was a "derelict vessel" within the meaning of section 823.11(1)(b), the Commission bears the burden of proof. *Fla. Dep't of Transp. v. J.W.C. Co.*, 396 So 2d 778, 788 (Fla. 1st DCA 1981) (stating that "[i]n accordance with the general rule, applicable in court proceedings, 'the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.'") (quoting *Balino v. Dep't of HRS*, 348 So. 2d 349 (Fla. 1st DCA 1977)).



21. Section 823.11(1)(b) does not provide a standard of proof in proceedings such as the instant case. Section 120.57(1)(j), Florida Statutes, provides the following:

Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.

22. There is some question whether the standard of proof in a case of this nature should be a simple preponderance of the evidence or the more stringent standard of “clear and convincing” evidence. *See Sundwall v. Fla. Fish & Wildlife Conserv. Comm.*, Case No. 19-4039 at ¶¶ 30-31 (Fla. DOAH Jun. 1, 2020). In the instant case, as in *Sundwall*, “[a]ny uncertainty about the appropriate standard of proof is a moot point ... because the Commission proved by clear and convincing evidence” that Mr. Zukowski’s sailboat was, and is, a “derelict vessel,” within the meaning of section 823.11(1)(b). Mr. Zukowski acknowledged the boat’s condition and accepted his responsibility for it.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Fish and Wildlife Conservation Commission issue a final order deeming the subject sailboat to have been a “derelict vessel” within the meaning of section 823.11(1)(b), and that the Commission is authorized under section 376.15(3)(a) to relocate or remove it.

DONE AND ENTERED this 8th day of December, 2021, in Tallahassee, Leon County, Florida.



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LAWRENCE P. STEVENSON  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of December, 2021.

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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.