

ADMINISTRATIVE APPEAL DECISION

PROFFERED PERMIT

JOHN MOYANT

FILE NUMBER 2005-3515

JACKSONVILLE DISTRICT

APRIL 29, 2007

Review Officer: Michael F. Bell (RO), US Army Corps of Engineers (Corps), South Atlantic Division (SAD), Atlanta, Georgia

Appellant: John Moyant

Receipt of Request for Appeal (RFA): March 19, 2007

Appeal Accepted: April 11, 2007

Appeal Conference/Site Visit: April 27, 2007

Summary of Decision: I find that the appeal does not have merit. I find that the District evaluated and documented their proffered permit and modification to the proffered permit December 7, 2006, according to applicable laws, regulations, and policy guidance. The special conditions placed on the permit are reasonable given the specific circumstances of the permit request.

Background Information: The Jacksonville District (District) received a permit application from the Appellant on March 29, 2005, to place 175 cubic yards of fill material over 5,375 square feet of wetlands on his residential lot. The Appellant proposes to construct a single-family home and a 13' wide x 40' long concrete marginal dock with davits, a 4' wide x 7' long access walkway, and a retaining wall around the project perimeter, in/over navigable waters of the US. The project site is situated along an unnamed residential canal adjacent to Florida Bay, legally described as Lot 9, Block 6 of the Breezeswept Beach Estates subdivision, in Section 32, Township 66 South, Range 29 East, Ramrod Key, Monroe County, Florida. The District issued a public notice advertising the proposed work on June 9, 2005.

According to the District's Environmental Assessment/Statement of Findings (EA/SOF) The basic project purpose is to provide boating access and fill for the property.

The District proffered a Department of Army (DA) permit to the Appellant on September 13, 2006. To mitigate for project impacts the Appellant was required to pay \$45,709.10

to the Florida Keys Restoration Fund. The Appellant did not agree with the cost associated with the mitigation and requested a permit modification. The Appellant did not offer any alternate type of compensatory mitigation.

Upon receipt of the modification request, the District reviewed the file. The mitigation fee assessment was determined by utilizing the mitigation index guidelines established for the Florida Keys (KEYMIG). To determine the in-lieu-fee mitigation amount the District initially coded the property as being in an area where the adjacent lot development is less than 50 percent. A project in an area that is not surrounded by development will have a higher mitigation fee because more ecological damage will occur.

After reviewing aerial photographs to obtain a broader view of the area, the PM determined that more than 50 percent of all the lots in the southeastern portion of Ramrod Key are developed and re-calculated the mitigation fee to total \$25,857.01. The PM sent a modified DA permit to the Appellant on December 7, 2006. The Appellant again disagreed with the cost to mitigate his project impacts and appealed the decision to the South Atlantic Division Commander on March 19, 2007. The Review Officer accepted the appeal on April 11, 2007.

Site Visit: Michael Bell, John Moyant and his builder Phillip Sears, joined District Project Manager (PM) Ingrid Sotelo, District Team Leader Paul Kruger (TL) on the site investigation before the appeal conference. The Appellant's property supports 100% coverage of a composition of white mangrove buttonwood, borrichia, and sesuvium. The shoreline fringe is approximately 70 percent covered with vegetation along the 60' long shoreline. Submerged aquatic resources include oysters, brown algae and mangrove prop roots, which populate a 5' deep x 60' wide area at the site. Vacant lots covered with buttonwood and mangroves exist on either side of the Appellant's lot; however, the subdivision is developing. The Appellant spent most of the site visit demonstrating how the vegetation on his lot was not as dense as his neighbor's property. The RO concluded the field investigation and the attendees adjourned to Marathon, Florida, for the appeal conference.

APPEAL EVALUATION, FINDINGS and INSTRUCTIONS to the Jacksonville District Engineer (DE):

Reason for the Appeal as Presented by the Appellant: The mitigation amount of \$25,857.01 is inconsistent with mitigation fees for other properties on the same street and in the same area.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: No dispute exists between the Applicant and the District that steps one and two of the required sequencing to avoid, minimize wetland impacts have been met

and that there are no other practicable alternative locations available to the applicant. The foremost reason for appeal is compensatory mitigation. Specifically, the Appellant believes one of his neighbors has more mangrove fringe on their property and is paying about the same mitigation fees. He views his mitigation payment as unfair and costly.

The appellant stated that his property is not essentially different from the neighbor's property or other properties in close proximity. He emphasized that most of the lots on the same canal system were paying smaller mitigation fees. The RO emphasized to the Appellant that the Corps of Engineers evaluates each permit on its own merits. However, if this permit decision is not supported by facts, then the appeal might have merit. The RO reviewed the Appellant's permit conditions before reviewing the mitigation fees paid by the neighboring lot.

The District's modification letter December 7, 2006, and the EA/SOF September 13, 2006, discuss how the adverse impacts for the proposed project are calculated. The effects evaluations are undertaken with a view toward being able to assign an identified debit to be offset by a credit. The method for assessing debits should be comparable to the method used for assigning credits. Corps regulatory program project managers are responsible for using consistent, district-approved methods for assessing and assigning credits or debits in terms of amount, type, and location. That is what happened in this case. The Jacksonville District used the Worksheet in the administrative record to provide the functional assessment of the project site. The outcome is derived by inserting information into equations on the worksheet.

The PM used the worksheet to determine a contribution of \$25,875.01 to the Florida Keys Environmental Restoration Trust Fund to offset impacts for the wetland fill. The Appellant believes that the mitigation fee is excessive even after the reevaluation of the permit reduced the original fee in half.

During the appeal conference, the TL and PM explained that the impact assessment involves three geographic areas of measurement. The first impact area includes the building lot. The second and third geographic areas include fringe areas at the shoreline and the benthic communities adjacent to the shoreline. The District representatives led the group through the *Functional Assessment KEYMIG Worksheet* contained in the administrative record. The *Functional Assessment within Improved Subdivisions* is commonly used in the Florida Keys to determine the amount of mitigation needed to compensate for lost aquatic resources. The District stated that the figures were accurate and the assessment was consistent with other functional assessments conducted in the past.

The Appellant stated that his lot was not covered in mangroves so the mitigation fee should be less. The KEYMIG worksheet rankings are based on vegetative cover and not mangrove cover. The PM stated that the ranking given to the lot is consistent with other lots she has worked on.

The Appellant provided the KEYMIG calculations for the neighbor's adjacent property. The total mitigation fee calculated for the property was \$26,919.90. Although the total mitigation in-lieu fee was higher for the neighbor, the Appellant pointed out that the calculations for the loss of shoreline fringe were less than his costs. The TL compared the figures and found that the Appellant's proposed project would impact more square feet of shoreline fringe and fill more total square feet of wetlands. The greater the acreage of filled and impacted wetlands, the greater the cost to mitigate. The Appellant produced documentation from another property and the comparison produced the same results as the first comparison. In conclusion, the compensatory mitigation fees the Appellant would pay are fair and supported in the Administrative Record. This appeal does not have merit.

The District provided the Appellant with the opportunity to provide mitigation on his own. The Appellant decided to stay with the in-lieu-fee program after being instructed on what is involved in providing an adequate mitigation site and plan with corresponding mitigation reporting requirements.

For the record, the District representatives explained the importance of the Florida Keys ecosystem, the history of moorage facilities in the area and the current review process for moorage facilities. They recognized the exceptional natural environment present in the Florida Keys, and that great care is required in the evaluation of permits to preserve and protect this valuable but fragile ecosystem. The waters surrounding the Florida Keys are designated as a National Marine Sanctuary and Aquatic Preserve. The mangrove shorelines in the Florida Keys provide a number of valuable functions as part of this critical ecosystem. Mangroves provide valuable nursery, foraging, and refuge habitat for commercial and recreational species of fish and shellfish such as blue crab, snook, striped mullet, and tarpon. Mangroves also provide nesting, foraging, and roosting habitat for several species of reptiles, amphibians, and mammals. Mangroves provide important water quality functions such as pollution uptake from bio-assimilation and assimilation of nutrients in runoff from uplands. They also stabilize shorelines, attenuate wave action, produce, and export detritus that is an important component of marine and estuarine food chains. Due to their location along the shoreline, mangrove systems provide a critical buffer between upland development and submerged aquatic resources including both seagrass beds and coral communities.

The TL further stated that over time, the State of Florida, including the Florida Keys, has lost over 50 percent of its mangrove habitat. Losses have resulted from both large-scale developments as well as the cumulative losses over time resulting from individual property owners who wish to live by the water. In the Florida Keys, it is this cumulative loss, in combination with the high quality aquatic habitat that makes it incumbent upon the District to evaluate each dock application carefully and assign appropriate compensatory mitigation.

CONCLUSION: As my final decision on the merits of the appeal, I conclude substantial evidence exists in the administrative record to support the proffered permit conditions

and conclusions according to applicable laws, regulations and policy guidance. The District's determination was not arbitrary, capricious or an abuse of discretion and was not plainly contrary to applicable law or policy. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.

Benjamin V. Butler, COL
FOR Joseph Schroedel
Brigadier General, US Army
Commanding