

ADMINISTRATIVE APPEAL DECISION

PROFFERED PERMIT

RANDALL and ANGELA RICHARDSON

FILE NUMBER 2006-3823

JACKSONVILLE DISTRICT

NOVEMBER 14, 2008

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

Appellant: Randall and Angela Richardson

Receipt of Request for Appeal (RFA): October 1, 2008

Appeal Accepted: October 31, 2008

Appeal Conference/Site Visit: November 12, 2008

Summary of Decision: I find that the appeal does not have merit. I find that the District evaluated and documented their proffered permit 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 received a permit application from the Appellant on March 17, 2008, to place 158 cubic yards of fill material over 5,600 square feet of wetlands on their residential lot. The Appellants propose to construct a single-family home and a 320 square foot marginal concrete dock with 2 davits and associated davit pads, 14 square feet stormwater retention wall and preserve 175 square feet of shoreline 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 22, Block 22 of the Cutthroat Harbor Estates, Section 29, Township 66 South, Range 28 East, Cudjoe Key, Monroe County, Florida.

According to the District's Environmental Assessment/Statement of Findings (EA/SOF), the basic project purpose is to provide a single-family residence with boating access.

The District proffered a Department of Army (DA) permit to the Appellants on August 18, 2008. To mitigate for project impacts, the Appellants were given the option of contributing \$30,361.46 to the Keys Environmental Restoration Fund or providing another type of mitigation. The Appellants offered no other mitigation option but

disagreed with the in-lieu-fee cost to mitigate for the project impacts and appealed the decision to the South Atlantic Division Commander on October 1, 2008. The South Atlantic Division Review Officer accepted the appeal on October 31, 2008.

Site Visit: Michael Bell joined District Project Manager (PM) Maria Riestra and District Team Leader Paul Kruger (TL) on the site investigation. The Appellant was contacted in mid-October and offered several dates in early and mid-November to select for the appeal conference. The Appellants could not attend any of the suggested dates but gave permission for the RO to conduct a site visit and question the District on the reason for appeal.

The Appellants' lot (Lot 21) adequately reflected the description of the site in the EA/SOF. The Appellants property supports 80% coverage of a composition of white mangrove, buttonwood, and Brazilian pepper. The shoreline fringe includes 100% coverage of red, white, and black mangroves, which form a 20' wide x 60' long stand. The lot shows evidence of human disturbance with scattered household debris. The District stated the property exhibits high wetland functions and values. The unconsolidated shoreline has 100% vegetative coverage which consists mainly of red mangrove and sea oxeye daisy. Submerged aquatic resources include two species of algae within the proposed footprint of the marginal dock. A vegetated undeveloped lot (Lot 23) adjoins one side of the Appellants' property with a recently cleared and filled lot (Lot 21) adjacent to the north side of the property. Lot 21 has a newly constructed marginal dock and a shoreline preservation area. The size of Lot 21's marginal dock, preservation area and amount of wetland fill is approximately the same as requested by the Appellants.

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

Reason for Appeal Transferred Verbatim from the RFA: Based on similar vegetation determinations, similar elevation determinations, and the ACOE's determination for monetary contribution to the Keys Environmental Restoration Fund for wetland preservation for the properties adjacent to my undeveloped lot, I respectfully request the ACOE re-evaluate the wetland delineation score for my property and reduce my required monetary contribution to the KERF.

My undeveloped lot on Buccaneer Lane, legally described as Lot 22, Block 22 in Cutthroat Harbor Estates, Section 28, Township 66 South, Range 28 East, Cudjoe Key, Florida, (MM 23 +/-) is adjacent to two other lots that contain wetlands. Due to these three adjacent lots containing similar vegetation and elevations, my undeveloped lot may have been overvalued as wetlands and subsequently been over scored.

Through previous applications with the ACOE, both of the adjacent lots to my undeveloped lot have received lower values and wetland delineations scores. Thus, each lot was subsequently required to make a smaller monetary contribution to the Keys Environmental Restoration Fund (KERF) for wetland preservation.

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: No dispute exists between the Appellants and the District that steps one and two of the required sequencing to avoid and minimize wetland impacts have been met and that there are no other practicable alternative locations for the Appellants' proposals. The foremost reason for appeal is compensatory mitigation. Specifically, the Appellants believe their neighboring lots contain "similar vegetation and elevations" but "each lot was subsequently required to make a smaller monetary contribution to the Keys Environmental Restoration Fund for wetland preservation." According to the Special Conditions of the proffered permit, the Appellants were offered the opportunity to mitigate for the project impacts by paying \$30,361 to the KERF, while the owners of adjacent lot 21 were only required to pay \$15,937.18 for compensatory mitigation for their similar proposal with similar project impacts. Lot 23 was undeveloped and the PM did not know of any permit actions for this lot.

The RO acknowledged during the site meeting that the Corps of Engineers evaluates each permit on its own merits. However, if this permit decision is not supported by facts in the administrative record or appears to be inconsistent with District decisions in similar situations, then the appeal may have merit. The RO reviewed the two lots and the permit conditions of the proffered permits. At the Site Visit the RO observed very wet, or obligate vegetation on the Appellants' property while lot 21 was filled. Fortunately the same PM evaluated both properties and supplied documentation for both lots.

The District's *Functional Assessment KEYMIG Worksheet* (Worksheet) for both lots identifies how the adverse impacts for the proposed projects were calculated. The effects evaluations were 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 District used the Worksheets in the two administrative records to provide the functional assessments of the two sites. The outcome is derived by inserting information into equations on the worksheet.

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 Worksheets contained in the administrative records. The District stated that the figures were accurate and the assessment was consistent with other functional assessments conducted in the past.

The RO compared the information from the worksheets and found that the main difference in the compensatory mitigation calculations was how the District evaluated the preexisting site conditions. Before any fill was placed, Lot 21 had more significant preexisting impacts and contained more exotic vegetative species than Lot 22. These impacts lowered the habitat unit value for Lot 21 which in turn decreased the amount of mitigation required to compensate for wetland value losses. The cost to mitigate is commensurate with the amount, function and value of wetlands impacted or filled. It was this contrast in the preexisting site conditions that led to the difference in compensatory mitigation amounts between the two lots. 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 without using the KERF. 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, which are in accordance with 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.

A handwritten signature in black ink, appearing to read "Joseph Schroedel". The signature is written in a cursive style with a large initial "J" and "S".

Joseph Schroedel
Brigadier General, US Army
Commanding