

ADMINISTRATIVE APPEAL DECISION

PROFFERED PERMIT

TOM KADERABEK

FILE NUMBER 2005-4114

JACKSONVILLE DISTRICT

DATE: MARCH 22, 2007

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

Appellants: Tom Kaderabek and Augie Leo.

Receipt of Request for Appeal (RFA): November 28, 2006.

Appeal Accepted: February 8, 2007.

Appeal Conference/Site Visit: March 12, 2007.

Summary of Decision: This 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, including the revised scope and size of the dock, are reasonable given the specific circumstances of the permit request.

Background Information: On April 26, 2005, the Appellant submitted a Department of the Army (DA) permit application to the Jacksonville District to construct a 13.5 feet x 65 feet concrete marginal dock that would run the entire length of his property. A concrete marginal dock is a concrete platform on top of the canal bank and retaining wall, which permanently fills and destroys riparian and near shore habitat. The property is located on an unnamed manmade canal adjacent to Florida Bay, legally described as Lot 208, of the Port Antigua Plat No. 5-6, part of Tract 5, Matecumbe Sandy Beach, in Section 21, Township 64 South, Range 36 East, Lower Matecumbe Key, Monroe County, Florida.

The lot is adjacent to a residential canal tributary to Florida Bay. The navigable width of the adjacent canal is 60 feet. The 65-foot wide lot will eventually contain a single-family residence and is upland in its entirety. The shoreline fringe is densely covered with red mangroves and green buttonwood except for an 8 feet wide section void of vegetation. The submerged aquatic resources consist of 55-60 percent coverage of mangrove prop roots, bivalves, and green and brown algae.

After discussions with the Appellant, the District required modification of the moorage facility request to minimize impacts to mangroves and submerged aquatic resources. The modification required the Appellant to construct a freestanding "T" shaped dock and access walkway with ½-inch spacing between deck boards. The purpose of the deck board spacing is to allow light penetration to the submerged aquatic resources. The District also required the dock to be elevated 3 feet above mean high water line and the access walkway located at the area of shoreline void of vegetation.

On June 6, 2005, the Corps issued a Public Notice for the original proposal with modifications required by the District. Resource agencies did not object to the proposal the District modified. The Appellant did object to the modified proposal and did not agree that the proposal was practicable. Although some "T" shaped moorage facilities have been permitted in Port Antigua, there are concrete marginal moorage facilities along the majority of the canals in Port Antigua. The Appellant did not sign the permit and appealed the proffered permit to the South Atlantic Division Commander. The South Atlantic Division Review Officer accepted the appeal on February 8, 2007.

Site Visit: On March 12, 2007, the RO conducted an on-site visit with the Appellant and his consultants to review and discuss the permit area and surrounding environment. During the site visit, the RO found that the subject area compared favorably with the existing site conditions described in the District's Environmental Assessment and Statement of Finding (EA/SOF). The site visit and appeal conference occurred simultaneously.

Appeal Conference/Site Visit Participants: Review Officer Michael Bell, Appellants Tom Kaderabek and Augie Leo, appellant consultants Edward A. Swakon P.E., and Steve Langley, P.E., and Project Manager (PM) Megan Clouser, Paul Kruger and Ivan Fanin of the Jacksonville District.

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

Reasons for the Appeal as Presented by the Appellant:

Appeal Reason 1: The dock authorized by this permit would extend six (6) feet beyond the permittee's property line. That is submerged land that is not owned by the permittee, and the owner (the Homeowners' Association) has indicated that it will not approve of this use of the submerged land. How can the Corps justify forcing an applicant to build a structure on someone else's property?

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: The District discussed project modifications with the Appellant throughout the permitting process. The District can require an applicant to change and reduce the scope and size of a project to minimize impacts to aquatic resources. The District can not “force” a trespass or any other permit condition the Applicant does not agree to. The District proffered a permit that minimized the projects impacts to Manatee habitat and other important riparian habitat functions while meeting the purpose and need of the project. The Applicant chose not to accept the permit and appealed the change in the docks scope and size to the Division Commander.

Corps regulations at 320.4 (r) *Mitigation* (1)(i), state:

Project modifications to minimize adverse project impacts should be discussed with the applicant at the pre-application meetings and during application processing. As a result of these discussions and as the district engineer’s evaluation proceeds, the district engineer may **require minor project modifications**. Minor project modifications are those that are considered feasible (cost, constructability, etc.) to the applicant and that, if adopted, will result in a project that generally meets the applicant’s purpose and need. Such **modifications can include reductions in scope and size**; changes in construction methods, materials or timing; and operation and maintenance practices or other similar modifications that reflect a sensitivity to environmental quality within the context of the work proposed. [emphasis added].

Corps regulations also state at 33 CFR 325.4(a):

District engineers will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.

The Appellants supplied no information at the appeal conference/site visit or in the administrative record to substantiate either the Homeowners Association’s authority over the submerged lands in question, or that the Homeowners Association would necessarily disapprove the “T” dock. The Appellants simply stated in electronic mail to the PM on November 11, 2006, that if the dock were built as proposed by the District, the Port Antigua Homeowners Association would sue the Appellants. No information exists in the administrative record to support this allegation.

During the appeal conference/site visit, the Appellants were asked if they had any materials from the Port Antigua Homeowners Association stating they will not approve the “T” shaped dock. The Appellants had no information from the Homeowners Association. The Appellants also provided no plats with submerged land property lines.

Regardless of whether the Homeowners Association owns the submerged lands in question, the Corps has authority to regulate structures in navigable waters and/or

waters of the United States. While regulations at 33 CFR 320.4 (j)(2) provide that “the primary responsibility for determining zoning and land use matters rests with state, local, tribal governments,” and that “[t]he district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance,” a decision by a homeowners’ association is not equivalent to zoning or land use decisions of state, local, or tribal governments. Accordingly, even if the Homeowners Association would not approve the “T” dock, the District is not necessarily obliged to alter its decision to reflect the final decision of the Homeowners Association. It is also worth noting that, in many cases, covenants and restrictions provide for authorizing deviations on a case-by-case basis.¹

In addition, during the site visit, the District and the Appellants made several measurements at the proposed moorage site and it was determined that support pilings for a moorage structure could be constructed without a “trespass” occurring. This reason for appeal has no merit.

Appeal Reason 2: The dock will impede navigation in this canal because the dock and the moored vessel will occupy more than 25 percent of the width of the canal. Their [District] excuse was that there is no vessel currently docked on the opposite side of the canal, but what would prevent the owner of that property from mooring a vessel on their shoreline? We noted in a letter to Ms. Clouser dated May 29, 2006, that SAJ-82 states that “...where a mangrove fringe or wetland vegetation exists along the shoreline and a “T” or “L” style dock would extend over more than 10 percent of the width of the water body [six feet in this case], the applicant will provide sealed measurements by a licensed engineer, architect or surveyor demonstrating the finished structure (including the beam of boat and mooring piles) will not exceed 25 percent of the navigable waterway.” No licensed engineer could make the claim for this dock.

FINDINGS: This reason for appeal has no merit.

ACTION: None required .

Discussion: During the appeal conference/site visit, the Appellants stated that the moorage facility the District has proffered will not occupy more than 25 percent of the width of the canal. However, the addition of a boat to the “T” shaped dock would extend the boat over 25 percent of the canal. The District pointed out that the 25 percent intrusion into a canal is a rule of thumb and is not a requirement of the proffered permit. In addition, the Appellant does not qualify for Regional Permit No. SAJ-82 and therefore this situation is not governed by its conditions. The District further stated that the proffered permit and an eight-foot wide boat would intrude less than 25% of the

¹ In a previous appeal decision, the Review Officer dealt with a similar allegation regarding the Port Antigua Homeowners Association. In the Administrative Appeal Decision, Roberto Tombo, File Number 200307995, Jacksonville District (January 20, 2006), the Review Officer was presented with portions of the pertinent restrictive covenants then in effect which expressly provided for authorizing deviations on a case-by-case basis where a property owner has been denied a permit and has exhausted his administrative remedies.

channel's width. The Appellants desired to have a boat moored at the dock wider than 8 feet.

The RO inquired about the width of the Appellants' boat. The Appellants do not own a boat. The Appellants are constructing the residence and moorage facility to sale. The Appellants will not live at the site or moor a boat.

After driving the subdivision, most of the moored boats appeared to be less than eight feet wide. The size and scope of the proffered permit with an eight-foot wide boat would not hinder navigation and is reasonable; therefore, this reason for appeal does not have merit.

Appeal Reason 3: The dock would not be aligned with the neighbor's seawalls, nor is it consistent with other docks built in this same neighborhood. We sent Ms. Clouser numerous photos of docks similar to what the applicant proposes in the same neighborhood. In most cases, there is a mangrove fringe behind the docks.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: The PM worked with the Appellants and their agents in an effort to reach an acceptable alternative to the concrete marginal facility. Discussions with the Appellants included items related to potential dock design changes as well as permitting requirements typically associated with permits issued in the Florida Keys. While it is true that there are concrete marginal moorage facilities in other portions of the canal systems in Port Antigua, the District no longer considers concrete shoreline moorage facilities when canals are wide enough to support a dock at the end of an access walkway. The Corps has worked with other landowners in the Keys either to construct a "T" shaped dock or to minimize the length of a concrete marginal dock where canals are too narrow to support a dock at the end of an access walkway. These alternatives provide a docking facility, while still minimizing impacts to the mangrove habitat that is essential for the Florida Keys ecosystem.

The District stated in the EA/SOF (page 2):

The project design has been modified by the Corps to minimize impacts to mangroves and submerged aquatic resources on the project site. The original submittal received on April 26, 2005, proposed a 13.5 feet x 56 feet concrete marginal dock that would run the entire length of the property with no on-site avoidance or minimization. The Corps will require the applicant to construct the freestanding "T"-dock and access walkway with a ½- inch spacing between deck boards. The purpose of the ½-inch spacing between deck boards instead of a solid concrete structure is to allow for light transmission to the submerged aquatic resources. The Corps will also require the dock to be elevated 3 feet above mean high water measured from the top surface of the decking, and the

access walk shall be placed within the 8 foot wide open area along the shoreline that currently does not support shoreline vegetation.

The importance of the mangrove shorelines in the Florida Keys is that they 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, which 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.

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.

As noted in the RFA, some portions of the canals in Port Antigua have fringe mangroves that have established behind the marginal concrete docks. During the appeal conference/site visit, the Appellants wanted to show the RO a recently constructed "T"-dock in the same subdivision. This "T"-dock was closer to the shoreline, which had resulted in the destruction of more mangroves. Appellants' complaint was that the District wanted the Appellants to protect more mangroves than this recently constructed "T"-dock. At the time of the appeal conference, a four-foot long nurse shark was resting in the protective shade of the "T"-dock next to mangrove roots. This was a good example of how such a moorage facility can provide aquatic habitat - the proffered permit would provide even more.

The District Engineer's action in proffering a permit for a modified project with reduced impacts would not be contrary to the public interest, would comply with the Section 404(b)(1) Guidelines, and would still meet the overall project purpose, and was within his discretion.

CONCLUSION: As my final decision on the merits of the appeal, I conclude there is substantial evidence in the administrative record to support the Jacksonville District's decision to issue a conditional Department of the Army permit. 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 H. Butler, COC
for Joseph Schroedel
Brigadier General, US Army
Commanding