

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO.: CVA1 08-70

LAWRENCE J. CHASTANG and
DORA P. CHASTANG,
Appellants,

v.

ORANGE COUNTY, FLORIDA,
Appellee.

Appeal from a decision of the
Special Magistrate for the
Orange County Code Enforcement Board.

William G. Osborne, Esquire,
for Appellant.

Edward M. Chew, Esquire,
for Appellee.

Before POWELL, BRONSON, LAUTEN, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Appellants Lawrence J. Chastang and Dora P. Chastang timely appeal from a decision of the Special Magistrate for the Orange County Code Enforcement Board (CEB), dated November 26, 2008, finding Appellants in violation of a certain code section applicable in Orange County, Florida. Specifically, Appellants' lakefront property was found to be in violation of section 15-218, Orange County Code of Ordinances (Code), for an unauthorized dredge and fill in county

waters.¹ The order, as the Court understands it, requires Appellants to remove the wall and fill behind the wall, restore the shoreline, and pay a penalty in the amount of \$7,000. The order also imposes a fine of \$250 per day for each day the violation occurred after the stated compliance date.² This Court has jurisdiction pursuant to Florida Rule of Appellant Procedure 9.030(c)(1)(C). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

The parties stipulated that if the wall was built landward of the Normal High Water Elevation (NHWE), which the county set at 98.5 in 1998, only a building permit would be required. However, if the wall was built waterward of the NHWE, both a building permit and a dredge and fill permit would be required. Therefore, the issue before this Court is whether there is sufficient competent evidence to support the findings and decision of the Special Magistrate that the violation occurred, that is to say, to support the Special Magistrate's implicit finding that the wall was built waterward of the NHWE in violation of the above-cited code provision.³

It is undisputed, as shown by the transcript and exhibits in evidence, that the wall was built in April and May of 2006, after the hurricanes of 2004. It is also undisputed that Appellants applied for and received a building permit prior to constructing the wall. Along with the permit application, Appellants submitted a survey, completed by a certified surveyor, showing that the wall was to be built landward of the NHWE. Following construction, the wall was inspected and

¹ Section 15-218 states in pertinent part:

It shall be unlawful for any person . . . to do any dredging, pumping of sand, extension of lands, construction or extension of islands, creating canals, basins, inlets or bays, filling or creating obstructions in, on, or under any of the waters of the county, except as provided herein; provided, however, that this act [article] shall not apply to the pumping of water.

² It should be obvious to anyone who reads the order that paragraph (1), requiring that Appellants "attempt to permit the seawall" by submitting an application for an "after-the-fact" permit, is a non-starter. Such a permit would obviously be denied. If Appellants wanted to build a new wall, they would first have to comply with the order, then submit an application for a building permit and a dredge and fill permit.

³ See *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982); *Orange County v. Butler*, 877 So. 2d 810 (Fla. 5th DCA 2004).

approved by a county building inspector. Appellants also received an “as-built” survey, completed by the same surveyor, showing that the wall had been built landward of the NHWE. It is further undisputed that Appellants did not apply for a dredge and fill permit.

In addition to the above undisputed evidence, Appellee presented the following evidence. On September 24, 2007, some seventeen months after the wall was constructed, a county surveyor conducted a survey which showed the wall waterward of the NHWE. During cross examination, the county surveyor admitted that lot elevations go up and down depending upon naturally occurring events. The Orange County Code also recognizes this phenomenon.⁴ The county surveyor also stated that he did not know what the normal high water conditions were on Appellants’ lot in April of 2006. In addition, the Environmental Protection Division (EPD) inspector opined that the wall was waterward of the NHWE when it was constructed. The inspector based her opinion on the county survey, her observations from 2007 that the wall had “water stains” above the lake’s water level, and her interpretation of three documents admitted in evidence.⁵ The inspector, like the surveyor, also admitted that she could not tell what the high water elevation was on lot 52 in April of 2006 because she was not working there at the time. None of Appellee’s witnesses provided testimony as to how far the wall was, in terms of inches or feet, waterward of the NHWE at the time it was surveyed by the county. The inspector further opined that Appellants had put fill in their backyard when building the wall; however, there was no other evidence in the record that Appellants had dredged or filled in, on or under the water of the lake while constructing the wall.

⁴ Section 15-228 provides in pertinent part:

It is recognized that the levels of waters in the county naturally rise and fall, depending upon hydrological, meteorological and geological circumstances and features. The natural rise and fall of the waters is essential to good water quality, but often makes it difficult to determine the natural landward extent of the waters.

⁵ The three documents admitted into evidence were: (1) a plat of the Deer Island Subdivision, dated 1985, showing Appellants’ lot; (2) a site plan for the original construction of the house on the property, dated June 30, 1987; and (3) an aerial photograph bearing the inked date of Nov/Dec 1985, but which Appellants’ counsel says was taken in 1990.

Accordingly, we find and conclude that there was not sufficient evidence to support the decision and implicit findings of the Special Magistrate. Appellants properly relied upon the survey submitted with the permit application and the building permit. They were not required to obtain a dredge and fill permit.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Special Magistrate's Order, dated November 26, 2008, is **REVERSED** and **VACATED**.

DONE AND ORDERED at Orlando, Florida this 11 day March, 2010.

_____/s/_____
ROM W. POWELL
Senior Judge

_____/s/_____
THEOTIS BRONSON
Circuit Judge

_____/s/_____
FREDERICK J. LAUTEN
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this 11 day of March, 2010, to the following: **William G. Osborne, Esquire**, 538 E. Washington Street, Orlando, Florida 32801 and **Edward M. Chew, Esquire**, Orange County Attorney's Office, 435 N. Orange Avenue, Suite 300, Orlando, Florida 32801.

_____/s/_____
Judicial Assistant

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ORDER DENYING MOTION FOR REHEARING

THIS MATTER came before the Court for consideration of Appellee’s “Motion for Rehearing or in the Alternative Motion for Remand,” filed on March 26, 2010, and Appellant’s “Response to Motion for Rehearing or in the Alternative Motion for Remand,” filed on April 8, 2010. This Court having reviewed the motion, the Final Order, entered on March 11, 2010, the court file, and being otherwise fully advised in the premises, finds as follows:

It is hereby **ORDERED AND ADJUDGED** that Appellee’s Motion for Rehearing is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the
__20__ day of _____ April _____, 2010.

_____/S/_____
ROM W. POWELL
Senior Judge

_____/S/_____
THEOTIS BRONSON
Circuit Judge

_____/S/_____
FREDERICK J. LAUTEN
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail on this 20 day of April , 2010, to the following: **William G. Osborne, Esquire**, 1305 E. Robinson Street, Orlando, Florida 32801 and **Edward M. Chew**, Orange County Attorney's Office, 435 N. Orange Avenue, Suite 300, Orlando, Florida 32801.

_____/S/_____
Judicial Assistant