

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RIVER TRAILS, LTD.,)	
)	
Petitioner,)	
)	
vs.)	Case No. 85-2272
)	
SOUTH FLORIDA WATER MANAGEMENT)	
DISTRICT,)	
)	
Respondent.)	
_____)	
RIVER TRAILS, LTD.,)	
)	
Petitioner,)	
)	
vs.)	Case No. 85-3678
)	
SOUTH FLORIDA WATER MANAGEMENT)	
DISTRICT,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William J. Kendrick, held a public hearing in the above-styled cases on February 18-20, 1986, at West Palm Beach, Florida.

APPEARANCES

For Petitioner: Phillip S. Parsons, Esquire
Landers, Parsons and Uhlfelder
P.O. Box 271
Tallahassee, Florida 32302

For Respondent: Stanley J. Niego, Esquire
South Florida Water Management District
Post Office Box V
West Palm Beach, Florida 33402

PRELIMINARY STATEMENT

These consolidated cases essentially raise the issue of whether Petitioner should be granted a right of way occupancy permit to construct a boat ramp and docking facility within the works of the Respondent.

At final hearing Petitioner called as witnesses, Brian Lahey, Douglas G. Winter, Thomas L. Fratz, Gerald Ward, and Daniel K. Odell. Petitioner's Exhibits 2,4,7,8, and 12-21 were received into evidence. Respondent called as witnesses, F.E.H. Schiller, Robert Chamberlain, Thomas J. Schwartz, Charles A. Padera, Edwin Hill, Harvey Rudolf, Kevin G. Dickson, Patrick M. Rose, Pamela B. Reeder, Thomas L. Fratz, Stacy Meyers, and David A. Smith. Respondent's Exhibits 1-58, 64,66,67,69-76,78-80, 84 and 85, were received into evidence. Respondent's Exhibits 59-61 were received into evidence for the limited purpose of establishing that a law suit had been filed against Respondent for injuries sustained on Respondent's property, and not for their truth.

A partial transcript of hearing was filed April 2,1986. The parties waived the requirement set forth in Rule 28-5.402, F.A.C., that a recommended order be entered within 30 days after the transcript is filed.

Petitioner and Respondent have submitted proposed findings of fact and conclusions of law. The parties' proposed findings of fact have been addressed in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Respondent, South Florida Water Management District (District) is a multipurpose water management agency of the State of Florida. Its duties include the operation and maintenance of a vast network of canals which provide flood control and other benefits to Palm Beach County.

2. Pertinent to this proceeding, the District is the owner in fee of a 600' right of way which contains a canal known as C-18. The tidewater reach of C-18 extends east from a control structure (S-46) near State Road 706 downstream for a distance of 8,375' (1.6 miles) to the southwest fork of the Loxahatchee River. Of this distance, 7,322' lie upstream from a small bridge, which crosses the C-18 at Loxahatchee River Drive (the bridge) and 1,053' downstream. The canal is approximately 200' wide, with 200' of overbank right of way on its north and south sides.

The River Trails Development

3. Petitioner, River Trails, Ltd (River Trails) is the developer of a 28 acre condominium community in Palm Beach County known as River Walk. The River Walk development, comprised of 347 townhouse units, is contiguous to 2,500' of the south overbank right of way of the C-18, approximately midway between S-46 and the southwest fork of the Loxahatchee River.

4. On December 9, 1983, River Trails filed an application with the District for a right of way occupancy permit to selectively clear and regrade the C-18 right of way and to construct a marina facility within the right of way consisting of a temporary parking area, boat ramp and 3 docking facilities with a combined capacity of 97 boats. The District approved River Trails' application and issued it a permit on January 12, 1984. That permit provided:

WORK PROPOSED WILL BE COMPLETED ON OR BEFORE 1-31, 1985, otherwise, this permit is voided and all rights thereunder are automatically cancelled unless an extension to the construction period is applied for and granted.

5. Upon receipt of the District's permit, River Trails began to selectively clear the bank of the canal of exotic vegetation, primarily Brazilian pepper, and to regrade the bank to a more gentle slope than its existing 12'-14' vertical drop on the west and 2'-3' vertical drop on the east. In the process, 28 mangrove trees were damaged or destroyed.¹

6. To settle a dispute which arose between Palm Beach County and River Trails over the destruction of the mangroves, River Trails agreed to plant additional mangroves and spartina grass along the southeasterly shoreline of the C-18. To consummate that agreement, River Trails requested that the District modify its permit to allow the selective planting of mangroves and spartina grass along the shoreline and in a tidal slough, to alter the bank slope to provide a wider intertidal zone to accommodate the plantings, and to move the proposed docks further out from the bank of the canal. The District granted River Trails' requested modification on June 25, 1984 subject to the following special conditions:

- Construction of the boat dock facilities as originally permitted and modified hereunder is subject to the issuance of a permit from the DER. Prior to commencement of

construction, the applicant shall submit a DER permit for the boat docking facilities.

- Any future modification of the boat docking facilities by the applicant must have the approval of the governing board prior to construction.

- Rule 40E 6.301(c), Florida Administrative Code, requires an applicant to give reasonable assurances that the proposed use of the works of the district "does not degrade the quality of the receiving body and meets the standards of the Florida Department of Environmental Regulation for the receiving body. The board may waive the strict enforcement of this provision." Neither issuance of the original permit nor this modification shall be construed as a waiver of this provision as it applies to the permitting activity of the DER relative to this project.

Department of Environmental Regulation Permitting

7. On December 22, 1983, River Trails applied with the Department of Environmental Regulation (DER) for a permit and water quality certification to construct its boat ramp and 97 slip marina. During the processing of that application, River Trails requested two waivers of the 90 day time period prescribed by Sections 120.60(2) and 403.0876, Florida Statutes, (180 days total) in order to conduct a hydrographic survey of the area in order to respond to water quality concerns raised by DER. River Trails did not submit a hydrographic survey to DER, nor did it offer such a survey in this proceeding.

8. On December 20, 1984, DER advised River Trails that its proposed boat ramp was exempt from permitting requirements. Thereafter, on December 21, 1984, DER issued its "intent to deny" the balance of River Trail's application predicated on its conclusion that the project was expected to have a long and short term adverse impact on the water quality and biological resources of the C-18 canal and the adjacent Outstanding Florida Waters of the Loxahatchee River. Specifically, DER found that degradation of water quality in the project's Class II waters and the adjacent Outstanding Florida Waters would likely occur due to:

(1) Shading from docks and walkways that would likely prohibit recolonization of shoreline vegetation.

(2) Marinas can be expected to lower water quality by the accumulation of marina source contaminants, including heavy metals, greases, oils, detergent ,and litter.

(3) Increased boat traffic (97+ boats), and their associated wakes will result in increased shoreline erosion. This additional erosion can prohibit the recolonization of shoreline vegetation beneficial to water quality.

(4) The cumulative impact of this project and other similar projects within the C-18 canal would be expected to degrade water quality.

(5) Prop wash from outboard motor boats in shallow littoral shelf areas will cause turbidity problems and adversely impact existing benthic communities. DER further found the proposed activity contrary to the public interest provisions of Chapter 253, Florida Statutes, since the proposed marina would substantially interfere with the conservation of the Florida Manatee and the destruction of natural marine habitat.

9. River Trails declined to pursue its DER application for the 97 slip facility any further. Instead, it filed an application with DER for a docking facility of less than 1,000 square feet, accommodating 37 boats, to qualify for the exemption provided by Section 403.812(2)(b), Florida Statutes. Following a successful rule challenge in April 1985, River Trails received its statutory exemption. The District's emerging management policy.

10. Shortly after the District approved River Trail's modification on June 25, 1984, it began to receive a great deal of negative comment from the public, DNR, DER, and the United States Fish and Wildlife Service. These comments, of which the District was not previously aware, included concerns for the Loxahatchee River, the Florida manatee, and negative biological and water quality assessments. Accordingly, the District's Governing Board requested that its staff investigate and evaluate various management options for the overall development of the 18 right of way.

11. During the ensuing months the District's staff solicited input from DER, DNR, the Florida Game and Fresh Water Fish Commission and the United States Fish and Wildlife Service; investigated the C-18; and formulated its recommendations for the future management of the canal. On January 10, 1985, the District's staff submitted its management plan to the Governing Board. The plan recommended that the intertidal zone be widened a minimum of 10 and planted in mangrove and spartina to combat erosion of the canal banks by boat wakes; that the canal banks be regraded to a minimum of one vertical on four horizontal slope and stabilized with a combination of grasses, native trees and shrubs; and that the overbank right of way be cleared of exotic species and replanted with native trees and shrubs. In keeping with the main goal of habitat improvement, staff recommended that the cumulative linear extent of areas provided for bankfishing and viewing be limited to 10 percent of the shoreline and that no structure be located waterward of the mean high water line.

12. Subsequent to its January 10, 1985, meeting the District has pursued its management plan for the alteration of the shoreline and berms of C-18. Since that time two permits have been issued to large developers who agreed to reslope and revegetate, at their expense, the banks of the C-18 in accordance with the District's plan, and in exchange for the esthetic view accorded by C-18. No dockage, boat ramps, or other structures have been permitted.

River Trails' permit expires

13. Following DER's denial of its application for a permit to construct the 97 slip marina, River Trails requested that the District modify its permit to reflect a 37 slip facility and extend the permit for one year. River Trails subsequently withdrew its request to modify the permit.

14. On January 10, 1985, the District entered an order denying River Trails' request for a one year extension of its permit. The District's denial was predicated on its perceived environmental sensitivity of the C-18 canal and the Loxahatchee River system, and its conclusion that the project was contrary to the restoration concept of the District's developing management plan for the C-18. River Trails filed a timely request for hearing, and the matter was referred to the Division of Administrative Hearings and assigned Case No. 85-2272.

15. On July 16, 1985 River Trails reapplied to the District for approval of its modified proposal for a boat ramp and 37 slip marina. The District denied River Trail's request on September 12, 1985. Reasons for denial included adverse water quality impacts, endangerment of the manatee population, increased bank

erosion and increased liability risks to the District associated with increased boat usage of the C-18. River Trails filed a timely request for hearing, and the matter was referred to the Division of Administrative Hearings and assigned Case No. 85-3678.

Impacts of the River Trails Development

16. Because of its location and physical characteristics, boating activity in the C-18 has not been extensive. The canal joins the Loxahatchee River on its western shore, opposite the popular boating areas in the intercoastal waterway and Atlantic Ocean adjacent to the River's eastern shore. Access to the canal is restricted by a bridge with a 6' clearance, and its western expanse is blocked by S-46. Accordingly, boating activity within this 1.6 mile stretch of 18 has been generally limited to fishing trips to S-46, sightseeing, and occasional water skiing.

17. River Trails' facility will increase boating within the C-18 well beyond the 37 slip capacity of its dock facility. River Trails proposes to provide upland storage for the boats of a all condominium unit owners, and expects a majority of owners to utilize the slips or boat ramp. Accordingly, use of the facility will not be limited to 37 boats but, rather, will reach into the hundreds.

18. The District's management plan for the C-18 is designed to restructure the canal's present configuration to provide natural habitat, reduced erosion and scenic beauty. As originally designed, the C-18 had 1 on 2 side slopes throughout its reach, however, erosion of the bank downstream from S-46 has resulted in nearly vertical, unstable side slopes above mean high water along 40 percent of its length. The overbank right of way is heavily vegetated with exotic species. With the exception of several areas near the downstream end of the canal, mangroves are not well established along the existing shoreline due to the shading effect of overhanging Brazilian pepper and a rather narrow unstable intertidal zone. Currently, little use of the overbank right of way is made by the public due to its dense vegetation, and any view of the canal is severely impeded.

19. Under the District's management plan the intertidal zone would be expanded and planted in mangroves and spartina to combat erosion from boat wakes and to provide natural habitat; existing vertical banks would be recontoured to a more gentle slope and stabilized with grasses and native trees; and the overbanks would be cleared of exotics so that native trees could prosper. To date the District has been successful in carrying out its plan; however, the survival of the mangrove seedlings and spartina is dependent on minimal disturbance. The introduction

of the boats from River Trails would increase erosion and prevent the recolonization of shoreline vegetation beneficial to water quality, marine habitat, and canal bank stabilization. Furthermore, existing and proposed development along the C-18 right of way can be reasonably expected to exacerbate the erosion problem if River Trails' permit is granted.

20. River Trails' proposed marina also raises the specter of adverse impacts to water quality, wildlife and habitat. The C-18 is classified as a Class II surface water body, and supports a diversity of aquatic life. Commonly observed species include snook, mullet, mangrove snapper, pinfish, needlefish and filter feeding organisms such as oysters. The endangered Florida Manatee, Trichechus manatus, is also observed in the C-18 and downstream in the Loxahatchee River.

21. The Loxahatchee River is classified as outstanding Florida waters (OFW) and critical habitat for the Florida manatee. The river, as well as C-18 up to the S-46 control structure, has also been included by the Department of Natural Resources (DNR) within the Loxahatchee River Zone of the Florida Manatee Sanctuary Act.³

22. Due to the restricted access from C-18 into the Loxahatchee River, boats located at River Trails' development will likely be approximately 23' in length and powered by outboard motors. Such watercraft, through their introduction of oils and greases, contribute to a degradation of water quality however, neither party addressed the potential impacts to water quality which would be occasioned by the total number of boats that would utilize the boat ramp and boat slips at the proposed facility. By failing to address this issue, and limiting its proof to the impacts from a maximum of 97 boats, River Trails has failed to give reasonable assurances that its proposed project will not cause or contribute to a violation of Class II water quality standards.

23. The impact of River Trails' project upon the Florida manatee is less clear than its impact upon the C-18. Although designated part of the manatee sanctuary, C-18 presently offers little in the way of food source for the manatee with the exception of some plant materials near S-46. The grass Fla. within the Loxahatchee River and the intercoastal waterway are the manatee's primary food source and congregating areas; however, as the mangrove and spartina plantings along the intertidal zone of the canal mature, the manatee may more often venture into the canal. Whatever their frequency within the narrow confines of the C-18, the numbers of boats that would be introduced by River Trails would drive the manatee from the area. These boats would not, however, pose a significant threat to the

manatee or its habitat within the Loxahatchee River since its navigation channels are well marked to avoid grass flats. Indeed, there has been no boat related manatee mortality in the Loxahatchee River area since 1977.

24. The District's concern regarding increased liability risk is unpersuasive. Pursuant to rule the District requires that an applicant for a permit to occupy right of way provide the District with insurance coverage satisfactory to the District, There is no suggestion that the insurance coverage tendered by River Trails, and accepted by the District, was inadequate or otherwise unsatisfactory.

25. The District's decision to deny River Trail's application was not inconsistent with its existing practice. While the District has permitted docks and boat ramps in other canals, there was no showing that those canals abutted a sanctuary or were under redevelopment to improve the works of the District.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties to, and subject matter of, these proceedings.

27. River Trails contests the decision of the District to deny it a one year extension of its permit number 7737, to allow the construction of a boat ramp and 97 slip marina in the District's Canal C-18 (Case No. 85-2272), and the District's decision to deny its request to modify permit number 7737 to allow the construction of a boat ramp and 37 slip marina in the District's canal C-IS (Case No. 85-3678). Pertinent to these proceedings are the provisions of Section 373.085, Fla Stat, and Chapter 40E-6, F.A.C.

28. Section 373.085, Fla. Stat. ,provides:

The governing board shall have authority to prescribe the manner in which local works provided by other district or by private persons shall connect with and make use of the works of the district, to issue permits therefor, and to cancel same for noncompliance with the conditions thereof, or for other cause.

29. Chapter 40E-6, F.A.C., implements a permitting system regulating the use of or connection to, works of the District. That chapter provides:

40E-6.301 Conditions for Issuance of Permits

(1) In order to obtain a permit under this chapter, an applicant must give reasonable assurances that the proposed use of works of the District:

(a) will not interfere with the construction, alteration, operation, or maintenance of the District.

* * *

(c) does not degrade the quality of the receiving body and meets the standards of the Florida Department of Environmental Regulation for the receiving body. . .

* * *

(2) The following conditions and criteria shall also be met:

(2) Unless expressly authorized by the Board no permanent structure shall be constructed within works of the District except bridges over channels, culverts through levees, lateral connections with major channels, public utility lines, mains and cables, and public roads.

* * *

40E-6.331 Modification of Permits.
Applications for modification to permitted uses shall be made in the same manner and reviewed using the same criteria as new uses, pursuant to. . . 40E-6. 301.

30. River Trails has failed to provide reasonable assurances that its proposed project will not interfere with the construction, alteration and operation of works of the District. The District's management program for the C-18, fully explicated in this proceeding, is primarily designed to reduce erosion, improve habitat, and restore the scenic qualities of this waterway. Power boats associated with River Trails' project, apart from the cumulative effect of other projects, will substantially increase wave action along the intertidal zone of the canal and thereby increase erosion and adversely impact the

District's efforts to establish mangroves and other native species. River Trails has further failed to provide reasonable assurances that its proposed use will not degrade the water quality of the C-18, a Class II waterbody.

31. Apart from the foregoing, River Trails' request for a one year extension of its permit authorizing the construction of a 97 slip facility is moot. River Trails abandoned that proposal and sought only authorization to modify its permit to construct a 37 slip facility. See: Montgomery v Department of Health and Rehabilitative Services, 468 So. 2d 1014 (Fla. 1st DCA 1985).

Based on the foregoing Findings, of Fact, and Conclusions of Law, it is

RECOMMENDED that the District enter a Final Order that:

1. River Trails' application for an extension of permit number 7737 be denied.

2. River Trails' application for modification of permit 7737 be denied.

3. River Trails be authorized, until otherwise directed by the District, to enter upon District property for the sole purpose of maintaining the existing plantings and sodding within the right of way.

DONE AND ENTERED this 23rd day of April, 1986 at Tallahassee, Florida.

WILLIAM J. KENDRICK, Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32399
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of April, 1986.

ENDNOTES

- 1/ Seventeen mangrove trees were eliminated, and eleven damaged.
- 2/ At hearing, River Trails expressly denied any intent or desire to pursue its 97 slip facility.
- 3/ The District asserted that the C-18 was also designated part of the Loxahatchee Aquatic Preserve. The District's assertion was not supported by the record. See: Sections 253.03 and 258.40, Florida Statutes.

COPIES FURNISHED:

Joseph W. Landers, Jr., Esquire;
Philip S. Parsons, Esquire
Landers, Parsons & Uhlfelder
Post Office Box 271
Tallahassee, Florida 32302

Stanley J. Niego, Esquire
South Florida Water Management
District
Post Office Drawer V
West Palm Beach, Florida 33402

APPENDIX

Petitioner's proposed findings of fact, consisting of 18 unnumbered paragraphs, have been numbered 1-13 and addressed by the Recommended Order as follows:

1. Addressed in paragraphs 2, 3, 4 and 22.
2. Addressed in paragraph 4, Conclusions of Law.
3. Addressed in paragraph 25.
4. Addressed in paragraphs 6 and 10-12.
5. Addressed in paragraph 14. Petitioner's assertion that "Mr. Fratz acknowledged, however, that River Trails' project was in compliance with the C-18 management plan" is rejected as contrary to the evidence. While River Trails' grading and planting of the right of way is consistent with the District's plan, its overall project" is not consistent.
6. Addressed in paragraph 15.
7. Addressed in paragraphs 14 and 15.
8. Addressed in paragraphs 21 and 25.
9. Addressed in paragraphs 20-22.
10. Addressed in paragraphs 20, 21, 23 and 25.
11. Addressed in paragraph 23.

12. Addressed in paragraph 23.
13. Addressed in paragraphs 17, 19, and 23.
14. Addressed in-paragraphs 22 and 23.
15. Addressed in paragraph 21.
16. Addressed in paragraph 24.
17. Addressed in paragraph 24.
18. Addressed in paragraph 19.

Respondent's proposed findings of fact have been addressed as follows:

- 1 & 2. Addressed in paragraph 1.
3. Addressed in paragraph 2 and 18.
- 4 & 5. Addressed in paragraph 21.
6. Addressed in paragraph 3.
7. Addressed in paragraphs 4 & 10.
- 3 & 9. Addressed in paragraph 4.
10. Addressed in paragraphs 5 & 6.
11. Addressed in paragraph 10.
12. Addressed in paragraphs 7-8.
13. Addressed in paragraph 9.
- 14 & 15. Addressed in paragraphs 10-12.
- 16-20. Addressed in paragraphs 10-12,13-14.
- 21-22. Addressed in paragraphs 9 & 15.
23. Addressed in paragraph 12.
- 24-26. Addressed in paragraphs 19-19.
- 27-34. Addressed in paragraph 23.
35. Addressed in paragraph 19.
36. Addressed in paragraph 17.
- 37-38. Not relevant.
39. Addressed in paragraph 20.