

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ALBERT F. COOPER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 88-4932
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
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RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing on June 15, 1989 in Panama City, Florida, before Ella Jane P. Davis, a duly assigned Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Bonnie K. Roberts, Esquire  
Post Office Box 667  
Bonifay, Florida 32425

For Respondent: Vernon L. Whittier, Jr.  
Senior Attorney  
Department of Transportation  
Haydon Burns Building  
605 Suwannee Street, M.S. 58  
Tallahassee, Florida 32399-0458

STATEMENT OF THE ISSUE

Does Petitioner's proposed seaplane base site meet the requirements for a site approval as provided in Section 330.30, F.S. and Section 14-60.005-.007, F.A.C.?

PRELIMINARY STATEMENT

At formal hearing, Petitioner Cooper presented the oral testimony of Albert F. Cooper, Jim Walters, and Hal Britton. The Respondent Department of Transportation (DOT) presented the oral testimony of Frank Duke, Bobby R. Grice, Linda Hunt, Norman Fralick, John F. Dearing, Jerry Serpas, John Williams, John Coleman, and Harold Richardson. Eight joint exhibits were admitted into evidence. Petitioner had twenty additional exhibits admitted into evidence. Respondent Department of Transportation (DOT) had one additional exhibit admitted into evidence. Slide number five in Petitioner's exhibits was withdrawn by the Petitioner.

A transcript of formal proceedings was duly filed and all timely-filed proposed findings of fact have been ruled on, pursuant to Section 120.59(2), F.S. in the Appendix to this Recommended Order.

## FINDINGS OF FACT

1. By application dated October 7, 1987, Petitioner applied to DOT for approval of a seaplane base on Deerpoint Lake in Bay County, Florida. The application originally provided for limited commercial flying and use by visiting seaplanes upon invitation by Petitioner. Petitioner also has submitted an October 21, 1987 letter from the Federal Aviation Authority (FAA) granting airspace approval and an October 29, 1987 letter from the Bay County Commissioners stating that no zoning existed in Bay County which would prohibit the location of the seaplane base at Deerpoint Lake.

2. The application was subsequently amended to limit use of the proposed seaplane base to Petitioner's personal, non-commercial use, and at formal hearing, Petitioner bound himself to accept approval of a seaplane base permit restricted exclusively to his private usage and to flying only during daylight hours, and under Visual Flight Rules (VFR) which call for an altitude of 1,000 feet and three miles of visibility.

3. By a resolution dated August 16, 1988, the Bay County Board of County Commissioners adopted a resolution opposing Petitioner's seaplane base.

4. By letter dated August 30, 1988, DOT denied Petitioner's application because of zoning, noise, and safety.

5. Petitioner owns land on a peninsula in the Highpoint area of Deerpoint Lake. Deerpoint Lake is a freshwater lake approximately seven miles long and approximately two miles across at the point it runs up into Bayou George. The landing area proposed by Petitioner would be 200 feet wide and 7,000 feet long, running in an east/west direction with a ramp and hangar located on the peninsula. Although Petitioner testified that the area is large enough to provide multiple landing areas, the landing approaches would be generally over Bayou George. The proposed site would permit takeoffs and landings of Petitioner's presently owned seaplane without flying over anyone's house at an altitude of less than 1,000 feet.

6. Petitioner's seaplane is a four place Aeranca with a 145 horsepower engine. It has no wheels and is equipped with pontoons for water landings. The plane has a muffled exhaust, self contained fuel tanks, and does not discharge emissions into the water. Takeoff time takes approximately 15 seconds at full power with two people on board. Eight hundred feet is necessary for takeoff which produces the loudest noise the plane makes. Landing is accomplished at a low power setting, is generally silent, and requires only 400 feet. DOT has assembled no factual or scientific data for noise. The witnesses are not in agreement as to the volume of noise produced by this plane and there was no reliable evidence which would indicate the decibel level generated at takeoff, but similar descriptions from several pilot that Petitioner's takeoff is "no noisier than an average motor boat, if muffled" is credible and accepted. In weighing the evidence presented with regard to the noise factor, the testimony of several local residents who testified concerning their opinions that the noise made by Petitioner's seaplane upon takeoff and landing was "excessive" has been discounted because these respective opinions are largely not credible either because the witness had no experience with seaplanes, or because the witness was prejudiced against the Petitioner's project as a whole. Specifically, no witness had made a complaint about noise until after the hangar was built. Some witnesses erroneously assumed that Petitioner had erected his hangar without a building permit and further believed an unfounded rumor that

the Petitioner must be starting a flying school, or they considered the hangar an "eyesore", or they felt "betrayed" that a neighbor would establish a flying school base.

7. Deerpoint Lake is a low population density area, almost exclusively residential in nature. DOT has done no survey of any kind with regard to the recreational uses of this lake, however evidence adduced at hearing shows that it is used primarily for recreational fishing and water sports. The largest number of fishing boats traceable to lake visitors at one time is twelve, but this does not account for additional abutting owners' boats which are launched without trailers. The concentration of boaters tends to be 3-4 miles away from Petitioner's property. However, there are also private boat ramps on both sides of Petitioner's property. Deerpoint Lake is also a reservoir area and a source of potable water for the county. There are some power poles in the vicinity of Petitioner's property. Some poles support a new power line and others are only the remains of an abandoned power line. The old power poles are generally cut off to be only 3-4 feet above the waterline, and some are just even with the waterline. Both sets of power poles and the power line limit where seaplanes can take off and land on the surface of the water itself, although there is testimony that, under ideal conditions (i.e. if all conditions are met and no flying or boating rules are disobeyed), Petitioner's standard plan for takeoffs and landings would not encounter either power line or poles upon takeoff or landing. There is, of course, no guarantee that all conditions will be favorable all of the time. The more probable danger presented by the poles is that if a seaplane had to taxi or otherwise take evasive action on the surface of the water so as to avoid a fishing boat, swimmer, or water-skier, the plane could encounter a cut-off pole.

8. Petitioner first located his plane on Deerpoint Lake in July, 1984 and has accomplished approximately 25 safe takeoffs and landings therefrom since that time. Since becoming aware of the need for a site permit, he has voluntarily not taken off or landed on the lake. He has never had an accident there, but two other planes have. Neither of the situations, planes, or pilot in these two accidents is comparable to Petitioner's circumstances. Neither accident involved recreational users of the lake.

9. Bobby R. Grice, who ultimately denied the application on behalf of DOT, expressed "just my personal opinion" that boaters could not hear a plane on its final approach. He has fished on Deerpoint Lake. He is not familiar with the operation of seaplanes, the visibility from them, or FAA rules. Two witnesses complained about Petitioner's coming too close to their homes during landings.

10. By County Ordinance 89-02, enacted January 17, 1989, the Bay County Board of County Commissioners prohibited seaplanes on Deerpoint Lake, but also provided for a variance procedure for those landowners in Petitioner's location. As of the date of formal hearing, Petitioner had not applied for, or received, a variance from the county. The October 29, 1987 letter obtained by the Petitioner from the County (see Finding of Fact No. 1) stating there were no zoning impediments to the application at that time has been superseded by the 1989 ordinance. Mr. Frank Duke, Chief Planner for Bay County, was unable to give a firm and competent opinion on whether or not the Petitioner's application to DOT was consistent with the existing 1978 Bay County Comprehensive Plan, because he had never personally observed the Petitioner's property on Deerpoint Lake. Nonetheless, it is clear that if Petitioner were to apply to Bay County for a seaplane base variance on Deerpoint Lake, Petitioner's proposed use would have to be reviewed in relationship to the County Comprehensive Plan.

## CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. See Section 120.57(1), F.S.

12. Section 330.30(1)(a), F.S. (1987) authorizes the Department of Transportation to issue site approvals for new airport sites in Florida. Section 330.30(1)(a), F.S. (1987) provides the following pertinent requirements:

2. That the proposed airport, if constructed or established, will conform to minimum standards of safety and will comply with applicable county or municipal zoning requirements;
3. That all nearby airports, municipalities, and property owners have been notified and any comments submitted by them have been given adequate consideration; and

13. The operative facts for analysis of this application are those in existence as of the date of formal hearing. See, *Boca Raton v. Florida Department of Health and Rehabilitative Services*, 475 So.2d 260 (Fla. 1st DCA 1985), *Florida Department of Transportation v. J.W.C. Co., Inc.*, 396 So.2d 778, (Fla. 1st DCA 1981), citing *McDonald v. Department of Banking and Finance*, 346 So.2d 569, 584 (Fla. 1st DCA 1977).

14. Section 14-60.007(2) and (3), F.A.C. establishes minimum approaches and effective landing lengths for private airports which provide for a 3,000 foot glide path of 20:1 ratio and a usable landing length of 1,800 feet. Additionally, Section 14-60.007(5), F.A.C. provides, in pertinent part:

- (a) No seaplane base shall be approved which requires aircraft to land or take off in close proximity to a bridge, public beach, power line, boat dock or other area which could constitute a danger to persons or property.  
(Emphasis supplied)

15. Upon the facts as found, Petitioner's proposal bring the seaplane's takeoff and landing into proximity with neighbors' boat docks and at least one power line.

16. As of the date of formal hearing, Petitioner, who bears the burden of proof in this cause, (See, *Balino v. Department of Health and Rehabilitative Services*, 348 So.2d 349 (Fla. 1st DCA 1977) and *Florida Department of Transportation v. J.W.C. Company, supra*) could not meet the requirements of Rule 14-60.005(8)3, F.A.C. which requires that Petitioner's application:

- Include documentation evidencing local zoning approval by the appropriate governmental agency. Where there is no local zoning, a statement of that fact from an official of the appropriate governmental agency shall be submitted.

Regardless of what Petitioner was able to submit with regard to Bay County zoning in 1987, he cannot presently comply with Section 330.30(1)(a), F.S. or Rule 14-60.005(8), F.A.C., due to the ordinance enacted January 17, 1989.

17. Because of the potential impact of Bay County's Comprehensive Plan, it also is neither reasonable nor appropriate for DOT to grant the site permit pending grant or denial of the variance by Bay County, even considering the provisions of Rule 14-60.05(8)(b)1.f.iii, F.A.C., cited by Petitioner. This is particularly so in light of the fact that no variance application has yet been submitted to Bay County by the Petitioner and in light of the August 16, 1988 Bay County resolution against Petitioner's proposed use, even though that resolution appears to be nonbinding and merely an expression of sentiment at the time it was passed.

18. Due to the foregoing conclusions, the nearby property owners' complaints concerning noise and their vague safety fears need not be discussed.

#### RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is recommended that Department of Transportation enter a Final Order denying Petitioner's seaplane base application.

DONE and ENTERED this 19th day of September, 1989, at Tallahassee, Florida.

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ELLA JANE P. DAVIS  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
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(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of September, 1989.

#### APPENDIX TO RECOMMENDED ORDER, CASE NO. 88-4932

The following specific rulings are made pursuant to Section 120.59(2) F.S., upon the parties' respective Proposed Findings of Fact (PFOF):

#### Petitioner's Proposed Findings of Fact

Accepted: 1, 2, 3, 4, 5, 7, 8, 11, (12 is accepted as modified to conform to the record), 13, 15, 19 a-b, 20, 22, 24.

Accepted except for material subordinate, unnecessary or cumulative to the facts as found: 6, 16, 21, 23. What is rejected is also not dispositive of the issue at bar.

Rejected as subordinate or unnecessary: 9,10.

Accepted in part; the remainder is rejected as not proven: 14, 17, 18.

Respondent's Proposed Findings of Fact

Accepted except for material subordinate, unnecessary, or cumulative to the facts as found: 1, 2, 4, 5.

Rejected as subordinate, unnecessary, or cumulative to the facts as found: 3, 6, 7, 8. Moreover, these proposals are largely reiteration of unreconciled testimony or legal argument.

COPIES FURNISHED:

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