

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HENRY C. FUCIK,)
)
 Petitioner,)
)
 vs.) CASE NO. 91-4391
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Hearing Officer of the Division of Administrative Hearings, on September 23, 1991, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Henry C. Fucik, pro se
8290 S.W. 58th Street
Miami, Florida 33143

For Respondent: Vernon L. Whittier, Jr., Esquire
Department of Transportation
605 Suwannee Street, MS-58
Tallahassee, Florida 32399-0458

STATEMENT OF THE ISSUE

The issue presented is whether Petitioner's application for site approval and licensure of a private seaplane base near Manatee Springs on the Suwannee River should be approved.

PRELIMINARY STATEMENT

Respondent issued its Notice of Intent to approve Petitioner's Airport Site Approval and License Application. Thereafter, a public meeting was conducted regarding Petitioner's application and, in response to the opposition voiced at and after that public meeting, Respondent advised Petitioner, by letter dated May 28, 1991, that Petitioner's application was denied. Petitioner timely requested a formal hearing regarding that denial, and this cause was subsequently transferred to the Division of Administrative Hearings for the conduct of that formal proceeding.

The Petitioner testified on his own behalf and presented the testimony of Elgin Branch and William T. Maphis, Sr. Respondent presented the testimony of David James Buchanan; William T. Maphis, Sr.; Paul Edward Perras, and Lacey F. Moore. Additionally, Petitioner's Exhibit numbered 1 and Respondent's Exhibits numbered 1-12 were admitted in evidence.

Only the Respondent submitted post hearing proposed findings of fact in the form of a proposed recommended order. A specific ruling on each proposed finding of fact can be found in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. By application dated July 18, 1990, Petitioner applied to the Department of Transportation for site approval and licensure for a private seaplane base to be known as Manatee Springs Seabase on the Suwannee River in Dixie County, Florida, seven miles south of Old Town. On the application, Petitioner agreed that the private seaplane base would be for his personal use, that it would not be used for commercial operations, that flight activities from the proposed site would be conducted only during the day, and that operations would only occur in VFR weather conditions.

2. Petitioner owns 362 acres of land with approximately 2,400 feet of that land being riverfront property. Petitioner's property is on the west shore of the Suwannee River.

3. Approximately across from the southern boundary of Petitioner's property is the Spring Run in Manatee Springs State Park. The Park extends a considerable distance to both the north and the south, far beyond the boundaries of Petitioner's property. Approximately 100 feet south of the entrance to Spring Run is the dock of Manatee Springs State Park. Numerous manatee have been sighted around the Park's dock, at the entrance to the Spring Run, in the Spring Run, and in the middle of the River across from the dock.

4. The Suwannee River between Petitioner's property on the west bank and the Park's property on the east bank is between 600 and 700 feet wide. In that area, the Suwannee River is open to all kinds of boat traffic, some of which travels as fast or faster than a seaplane taking off and landing. That area of the River is used by fishing boats, ski boats, airboats, jet skis, houseboats, and canoes. There is a tour boat which travels through the area in question, and canoes can be rented at the Park from a concessionaire. Personnel at the commercial canoe rental business advise renters to stay within 50 to 100 feet from the east shore line, along the Park. However, some renters ignore the instructions and cross the River.

5. Due to the heavier manatee and boat activity at the Spring Run and Park docking area across from the southern portion of Petitioner's property, Petitioner proposes that his landing and take-off area be located just to the north of the northern boundary of his property, away from the entrance to Manatee Springs State Park, in the middle of the River, and in a section of the River which is straighter, which would increase his visibility of boat traffic in the area. Petitioner will place no structures of any kind in the River.

6. Under Petitioner's proposal, he will store his seaplane in an area in the northern portion of his property. No structures will be constructed in this storage area. Petitioner would taxi out from the seaplane's storage area to his take-off and landing area which starts approximately 300 feet north of his storage site. The take-off and landing area would extend approximately 2,600 feet up the River and would be 100 feet wide.

7. Petitioner proposes to use either a two-passenger or four-passenger seaplane. Such seaplanes utilize 100 h.p. and 150 h.p. engines, respectively.

8. Such seaplanes taxi at 3-5 knots per hour, which speed would create the same wake as a canoe. When a seaplane is idling, it creates no wake. When a seaplane takes off, it rotates onto the pontoon step within 15 to 20 seconds and completes take-off within an additional 10 to 15 seconds. The total take-off time is approximately 30-35 seconds, and the seaplane during take-off will achieve a speed of 40-45 m.p.h., less the head wind. The total take-off distance is approximately 1,000 feet. Accordingly, Petitioner would be on the River for approximately 5 minutes of taxiing and 30 seconds of take-off, at which point the seaplane is off the River. The amount of wake created during take-off is 2-3 inches.

9. The distance between the entrance to the Spring Run into Manatee Springs State Park and the southern end of Petitioner's proposed landing and take-off area is 3,000 feet. Thus, Petitioner's proposed landing and take-off area is located a safe distance from where boaters and manatee congregate around the Springs. Further, although some of Petitioner's neighbors on the west shore of the Suwannee River tie their boats to trees along the shore, there are no docks extending into the River in or near the area proposed for the landing and take-off strip. There are a public boat ramp at Clay Landing approximately 2 miles above the proposed seaplane landing area, a public boat ramp somewhere south of the Park, and a third public boat ramp somewhere in the Park. The boat ramps are not close enough to Petitioner's proposed landing and take-off strip to pose any threat to their users from Petitioner's proposed use of his seaplane.

10. Petitioner is a licensed pilot, who possesses all appropriate ratings and has passed the required physical examinations. He learned to fly in 1940 and operated a seaplane base in Fort Walton during the 1940s and 1950s. He was then employed as a pilot for Eastern Airlines for 33 years. He has 18,000 hours of flying time, which includes 1,000 hours of flying seaplanes. He will carry liability insurance on his seaplane of at least \$100,000.

11. Petitioner understands that when his seaplane is on the water, it is subject to the rules and regulations governing boats and other watercraft. Accordingly, when "no wake" restrictions are in effect on the Suwannee River when the River is high, Petitioner cannot use his seaplane base.

12. The Department's aviation specialist assigned to process Petitioner's application for site approval visited Petitioner's property on five separate occasions, observing boat traffic on the River during his visits. On one occasion, he spent the day counting the boat traffic and estimating intervals of traffic relative to landing and take-off times. Although the River was high on that occasion, it was during a weekend when boat traffic would be heavier than during the week. He determined that the proposed location of Petitioner's seaplane base was a safe location and that Petitioner's activity would not constitute a hazard to boating traffic.

13. The Department issued its Notice of Intent to approve Petitioner's seaplane base, subject to several conditions:

1. All operations are conducted during daylight hours and during VFR weather conditions only.
2. Operations are prohibited on long holiday weekends that generate a high volume of river traffic (Memorial Day, 4th of July, Labor Day).

3. A non standard traffic pattern be used, all traffic patterns will be to the west of the extended runway center line to prevent over flight of Manatee Springs State Park.

14. Pursuant to the Department's regulations, Petitioner was required to provide notice of his application to all property owners within 1,000 feet from any boundary of the airport operational area, and the Department's Notice of Intent was published notifying interested persons that a public meeting would be conducted, if requested, on Petitioner's application. A number of persons attended the public meeting, some of whom supported Petitioner's application, but the majority of whom opposed Petitioner's application.

15. After the public meeting, the Department issued a letter denying Petitioner's application, citing the concerns voiced at the public meeting. Additionally, the denial letter advised Petitioner that the Trustees of the Internal Improvement Fund have state sovereignty jurisdiction of the River area where the proposed seaplane base would be located and that Petitioner would, therefore, need appropriate authorization from the Trustees through the Department of Natural Resources to use the sovereign submerged land. That letter further advised Petitioner that the Trustees' jurisdiction is subject to the navigation servitude of the federal government and that Petitioner, therefore, would need a permit from the Army Corps of Engineers to use the proposed site on the Suwannee River as a seaplane base.

16. Although the statutes and rules regulating the Department's site approval and licensure of airports and seaplane bases do not contain a requirement for authorization from the Trustees or the requirement of a permit from the Army Corps of Engineers, Petitioner contacted those agencies. By letter dated June 28, 1991, the Florida Department of Natural Resources advised Petitioner as follows:

Please be advised that you do not need authorization for the use of state-owned submerged lands if you are not storing your sea plane waterward of the Ordinary High Water Line of the Suwannee River, constructing structures waterward of the Ordinary High Water Line, or impacting state-owned submerged lands and resources when removing your seaplane from the Suwannee River.

Petitioner's proposal does not contain any of those characteristics. By letter dated September 6, 1991, the Department of the Army, Jacksonville District Corps of Engineers, advised Petitioner that no authorization or permit was required for his proposed seaplane base.

17. Petitioner can safely take-off and land in his proposed strip without presenting a danger to boaters and swimmers any greater than the risk presented by other fast moving vessels currently permitted to utilize the Suwannee River in the area under question. The height of a seaplane propeller poses no danger to swimmers or manatee. One must be fully licensed and trained to operate a seaplane, while one needs no training or licensure to operate a speed boat. The height of a seaplane presents a better view of obstacles in the River than the view of someone in a boat or in the River. A seaplane offers the ability to stop quickly or "pull up" in a split second to avoid something coming quickly into the path of the seaplane.

18. Although the Florida Department of Natural Resources advised Petitioner that he did not need authorization to use the state-owned submerged lands of the Suwannee River, employees of the Division of Recreation and Parks of the Department of Natural Resources testified at the final hearing in opposition to Petitioner's application. Those employees believe that Petitioner's proposed landing and take-off area is within the jurisdiction of the Division of Recreation and Parks pursuant to a Management Agreement entered into between the Division and the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida. That Management Agreement entered into on November 24, 1986, and amended on January 19, 1988, does grant management responsibilities to the Division over:

All those sovereign submerged lands lying within 400 feet of the Mean High Water or Ordinary High Water Line, or in the case where the shoreline is vegetated with . . . wetland vegetation, within 400 feet of the emergent edge of the vegetation, and within the riparian area of any state park. . . administered by the Division of Recreation and Parks

Petitioner's proposed landing and take-off strip is within 400 feet of the emergent edge of the vegetation of Manatee Springs State Park.

19. That Management Agreement, however, also provides that the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida retained the right to also engage in management activities over those sovereign submerged lands and further provides that the Management Agreement is not to be construed in any way to interfere with the traditional riparian rights of private landowners. Lastly, that Management Agreement required the Division of Recreation and Parks to submit to the Board for its approval a management plan for those submerged lands and prohibited the Division from engaging in activities not provided for in the required plan without the advance written approval of the Board. There was no evidence indicating that the Division had adopted any management plan for the area under consideration in this cause. Further, no explanation was offered as to how the Division of Recreation and Parks could impose requirements not imposed by the Department of Natural Resources.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties hereto and the subject matter hereof. Section 120.57(1), Florida Statutes.

21. Section 330.30(1)(a) Florida Statutes, provides the following requirements for issuance of an airport site approval:

1. That the site is adequate for the proposed airport;
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
4. That safe air-traffic patterns can be worked out for the proposed airport and for all existing airports and approved airport sites in its vicinity.

Section 14-60.005(8), Florida Administrative Code, provides the following requirements for an applicant prior to receiving site approval:

1. Demonstrate that the site is adequate for the proposed airport.
2. Demonstrate that the proposed airport, if constructed or established, will conform to minimum standards of safety.
3. 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.
4. Provide the Department a list of all airports and municipalities within 15 miles of the proposed airport and all property owners within 1,000 feet of the proposed airport.
5. Demonstrate that safe air traffic patterns could be worked out for the proposed airport.

22. The site selected by Petitioner is adequate for his proposed airport, i.e., Petitioner's landing and take-off strip. There is no dispute that the proposed seaplane base would conform to the minimal standards of safety for an airport and would comply with applicable county or municipal zoning requirements. Petitioner has submitted letters from the appropriate jurisdictions stating that they have no zoning regulations that would apply to Petitioner's proposal. It is undisputed that all nearby airports, municipalities, and property owners have been notified, and the Department has given consideration to the comments submitted by them. There is no dispute that safe air-traffic patterns can be implemented. Further, Petitioner has submitted to the Department letters from the United States Army Corps of Engineers and the Florida Department of Natural Resources stating that he needs no authorization or permits for his seaplane operation or his use of state-owned submerged lands under the Suwannee River since he is not going to build any structures in the River.

23. Although there was testimony that there is a rule of the Division of Recreation and Parks prohibiting airplanes from taking off or landing in state parks, including sovereignty submerged lands within 400 feet of state parks, thereby barring Petitioner's right to use the public waters of the Suwannee River, that testimony is inaccurate. Rule 16D-2.010(1), Florida Administrative Code, which regulates activities in state parks, provides as follows:

(1) Aircraft. No person operating or responsible for any aircraft, glider, balloon, parachute, or other aerial apparatus shall cause any such apparatus to take-off from or land in any park except in an emergency when human life is endangered or where a designated landing facility may exist on park property. [Emphasis added]

Even if the extended boundaries of 400 feet of sovereignty submerged lands pursuant to the Management Agreement could be held to constitute "park property," that rule specifically allows aircraft to land and take-off from designated landing facilities. Petitioner has applied to the Department for approval of his proposed seaplane base, which, if approved, would be a designated landing facility. Further, it cannot be reasonably argued that Petitioner can be excluded by the Park Service, part of the Department of Natural Resources, when he has been authorized by the Department of Natural Resources to use the public waters of the Suwannee River.

24. Further, the Management Agreement does not specify that the rules of the Division of Recreation and Parks found in Chapter 16D-2, Florida Administrative Code, apply to the submerged sovereignty lands adjoining State parks, as argued by the Department and some of its witnesses. Rather, the Management Agreement gives the Division of Recreation and Parks co-management authority over those sovereignty submerged lands within 400 feet and within the riparian lines of any State park administered by the Division of Recreation and Parks pursuant to Chapter 16D-2. Accordingly, the reference to Chapter 16D-2, Florida Administrative Code, is descriptive of the properties to which the Management Agreement applies and does not set forth that the sovereignty submerged lands are to be managed in accordance with Chapter 16D-2. Rather than making Chapter 16D-2 applicable to those sovereignty submerged lands, the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida has required the Division of Recreation and Parks to submit to the Board a specific management plan for each of the submerged lands adjacent to each park. The Management Agreement requires that such a management plan outline and provide details of how protection activities proposed for the sovereignty submerged lands will be implemented. Since no management plan for the sovereignty submerged lands adjoining Manatee Springs State Park was offered in evidence in this proceeding, it must be assumed that there is none, and, therefore, no authority has been cited that would allow Manatee Springs State Park to impose the rules contained in Chapter 16D-2 on users of the Suwannee River.

25. The Management Agreement specifies that it shall not be construed to interfere with traditional riparian rights of private landowners. No definition of "traditional" riparian rights is contained within that Management Agreement. However, Section 253.141(1), Florida Statutes, defines riparian rights to be rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law. The right to use a seaplane on public waters is not one of those rights as set forth in that statute and does not appear to be defined elsewhere as a riparian right. Although Petitioner's seaplane is subject to the same rules and regulations governing boats while it is on the water, the seaplane is not a boat. Although Petitioner's use of the River for his seaplane is not a specified riparian right, no specific prohibition against him doing so has been found.

26. Similarly, the Management Agreement itself does not specifically prohibit Petitioner's proposed use. The Management Agreement is not specific to Manatee Springs State Park but is simply a general Management Agreement between

the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida and the Department of Natural Resources, Division of Recreation and Parks, which applies to all parks of any nature within the State of Florida. The Management Agreement simply grants to the Division of Recreation and Parks the authorization to manage the sovereignty submerged lands within 400 feet of any State park for use or health and safety protection, for recreation, and for the protection of the sovereignty submerged lands and adjoining upland property. The Agreement does not specify what uses are prohibited or even permitted.

27. Although the Department is required to consider public comment regarding site approval, it is not required to be controlled by public comment. Many of the public comments and some of the testimony in this final hearing involved environmental concerns over which the Department of Transportation has no statutory authority or jurisdiction. Further, those environmental concerns do not constitute more than concerns. Although some persons complained about noise and pollution, no evidence was offered that a seaplane creates more noise or pollution than any other powered vessel. Although concern was expressed for the manatee, no evidence was offered that a seaplane has ever killed or injured a manatee, and Petitioner specifically selected his site to be distanced from the area in which the manatee congregate. Petitioner's proposed landing site is approximately 3,000 feet away from the Springs entrance and is even further from the Park's dock. Although some persons expressed concern for the safety of other boaters and swimmers, no evidence was offered that the danger to other boaters and swimmers is any greater from Petitioner's use of his seaplane than the risk taken by boating or swimming in an area used by speed boats, ski boats, and jet skis. It is undisputed that Petitioner enjoys the same rights as the general public to use public waters. No evidence was offered that the rights of swimmers are superior to those of jet skiers or others operating powered craft, including seaplanes.

28. Rule 14-60.007(5)(a), Florida Administrative Code, provides as follows:

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.

No evidence was offered that Petitioner's proposed landing and take-off site is in close proximity to a bridge, to a public beach, to a power line, or to a boat dock. Although there was testimony and argument that the proposed site is in an area which could constitute a danger to persons or property, the testimony was in the nature of the possibility that anything could constitute a danger to persons or property. However, the overwhelming weight of the evidence was that Petitioner's proposed site is not likely and is not reasonably expected to constitute a danger to persons or property. Although some persons are "concerned," no competent evidence was offered which would indicate that Petitioner's operation in fact could constitute danger to persons or property.

29. Further, the rule requires that a seaplane base not be in "close proximity" to an area which would constitute a danger to persons or property. No definition of "close proximity" is contained within that rule. Petitioner located his proposed site north of his property boundaries in order to not be in "close proximity" to the area where boaters, swimmers and manatee congregate. His proposed landing area is approximately 3,000 feet from the entrance to the Park and even further from the Park's dock; yet, Petitioner was only required by

the Department's rules to notify interested property owners within 1,000 feet of the proposed site. Since only persons within 1,000 feet must be notified so that they could voice their comments, it cannot be concluded that 3,000 feet constitutes "close proximity."

30. Although Park personnel performed a boat count covering the two days before the final hearing in this cause and concluded that there is "considerable" boat traffic in the area, the boat count was performed by counting the boats in the area every hour. No steps were taken to ensure that the same boats were not counted every hour, and the boat count on those two days is not determinative. The evidence is clear that boat traffic is heavier on weekends as a general rule, depending upon the condition of the River. When the River is high, few vessels are taken onto the River because of floating debris. When the River is low, boat traffic is heavier. However, there are also times when there is little boat traffic on the River and times when there is no boat traffic at all. The Department's proposed condition in its earlier Intent to issue the approval requested by Petitioner, which prohibits Petitioner from utilizing his seaplane base on long holiday weekends, is reasonable and prohibits Petitioner from taking off or landing during times when River usage is at its highest. Similarly, the other conditions proposed by the Department in its first preliminary decision are likely to protect other river users and lessen any danger to persons or property from Petitioner's proposed seaplane base.

31. Section 330.30(1)(b), Florida Statutes, provides that site approval may be granted subject to reasonable conditions and that such approval shall remain in effect for a period of two years unless sooner revoked by the Department or unless during that period a license for an airport on the approved site has been issued. Since Petitioner has no need to develop the site, i.e., no structures will be constructed, the issuance of a license by the Department to Petitioner should quickly follow the site approval by the Department. Section 330.30(2)(e) provides that an airport license expires one year after the effective date and may be renewed each year subject to any conditions the Department deems necessary to protect the public health, safety, or welfare. Subsection (f) authorizes the Department to revoke any license or renewal thereof, or refuse to issue a renewal, if the Department determines that there has been an abandonment of the airport, that there has been a failure to comply with the conditions of the license or renewal thereof, or, because of changed physical or legal conditions or circumstances, the airport has become either unsafe or unusable for the aeronautical purposes for which the license or renewal was issued. Accordingly, should uses permitted on the Suwannee River change or if conditions should occur which make Petitioner's seaplane base unsafe, the Department has the opportunity to revoke Petitioner's license or renewal thereof or to decline to issue a renewal.

RECOMMENDATION

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

RECOMMENDED that a Final Order be entered granting Petitioner's airport site approval and license application, with the conditions set forth in paragraph numbered 13 of this Recommended Order.

DONE and ENTERED this __26th__ day of November, 1991, at Tallahassee, Florida.

LINDA M. RIGOT
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this __26th__ day of November, 1991.

APPENDIX TO RECOMMENDED ORDER
DOAH CASE NO. 91-4391

1. Respondent's proposed findings of fact numbered 1-4 have been adopted in substance in this Recommended Order.
2. Respondent's proposed finding of fact numbered 5 has been rejected as not constituting a finding of fact.
3. Respondent's proposed finding of fact numbered 6 has been rejected as being subordinate to the issues involved herein.

Copies furnished:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS:

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.