

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMUNITY)
AFFAIRS,)
)
Petitioner,)
)
)
vs.) Case No. 97-5053DRI
)
CHARLOTTE COUNTY, a political)
subdivision of the State of)
Florida; MRP LAND TRUST, Owner;)
and RIVERWOOD LAND DEVELOPMENT)
COMPANY LIMITED PARTNERSHIP,)
Developer,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on January 8 and 9, 1998, in Port Charlotte, Florida, before Lawrence P. Stevenson, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Shaw P. Stiller, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

For Respondent, Carl Kitchner
Charlotte County: Assistant County Attorney
118500 Murdock Circle
Port Charlotte, Florida 33948-1094

For Respondents, Kenneth G. Oertel, Esquire
MRP Land Trust Oertel, Hoffman, Fernandez
and Riverwood & Cole, P.A.
Land Development Post Office Box 6507
Company: Tallahassee, Florida 32314-6507

STATEMENT OF THE ISSUE

The issue presented for decision in this case is whether Charlotte County Resolution Number 97-0870A0 (titled "A Resolution Amending Resolution #90-286, the Increment One DO for Riverwood DRI, as Amended by Resolutions #91-268, 92-07, 93-21, 94-38 and 95-190; Finding That This Amendment Does Not Constitute a Substantial Deviation; and Providing for an Effective Date") and Charlotte County Resolution Number 97-0860A0 (titled "A Resolution Amending Resolution #90-285, the Master DO for Riverwood DRI, as Amended by Resolution #91-267; Finding That This Amendment Does Not Constitute a Substantial Deviation; and Providing for an Effective Date")(collectively referred to herein as "the Resolutions") are consistent with Chapter 380, Florida Statutes; Rule 9J-2, Florida Administrative Code; the State Comprehensive Plan; the State Land Development Plan; and the Riverwood Master Development Order, as amended.

PRELIMINARY STATEMENT

By a Notice of Appeal and Petition filed with the Florida Land and Water Adjudicatory Commission on September 15, 1997, pursuant to Section 380.06, Florida Statutes, and Rules 9J-2.026 and 42-2.002, Florida Administrative Code, Petitioner appealed two ordinances adopted by the Charlotte County Board of County Commissioners on July 29, 1997. These resolutions amended the Master Development Order ("MDO") and the Increment One Development Order ("Increment One DO") for the Riverwood Development of Regional Impact ("DRI"), as more fully described

below, to add a 67.6 acre-parcel to said development orders. The 67.6 acre-parcel at issue had been subject to a Bald Eagle Management Plan, and was characterized by Petitioner as having been set aside in preservation as bald eagle habitat. The premise of Petitioner's appeal is that Charlotte County's finding that these amendments do not constitute "substantial deviations" from the previously approved MDO and Increment One DO is contrary to Chapter 380, Florida Statutes, and its implementing rules, and that Respondents MRP Land Trust and Riverwood Land Development Company Limited Partnership ("Riverwood LDC") should be required to submit an Application for Incremental Development Approval ("AIDA") and undergo further DRI review prior to adding the 67.6 acre-parcel to the existing development orders.

By letter dated October 27, 1997, the Florida Land and Water Adjudicatory Commission forwarded the Notice of Appeal and Petition to the Division of Administrative Hearings for assignment of an Administrative Law Judge and the conduct of a de novo formal administrative hearing in this matter, pursuant to Section 120.57(1), Florida Statutes.

The case was originally assigned to Judge Richard Hixson and scheduled for hearing on December 22-23, 1997. Upon motion by Petitioner, the hearing was continued and rescheduled for January 8-9, 1998. Due to scheduling conflicts, the case was reassigned to the undersigned prior to the final hearing.

At the final hearing, Petitioner presented the testimony of James I. Crews, a planner with the Department of Community

Affairs; Charles Gauthier, a growth management administrator with the Department of Community Affairs; and Kimberly A. Dryden, a biological scientist with the Florida Game and Fresh Water Fish Commission. Respondents MRP Land Trust and Riverwood LDC presented the testimony of Thomas C. Smith, the President of Riverwood LDC; Bruce C. Layman, an environmental consultant with the firm of Wilson, Miller, Baron & Peek; Steven C. Hartsell, an attorney with the law firm of Pavese, Garner, Haverfield, Dalton, Harrison & Jensen; and David W. Depew, President of Morris-Depew Associates, a land planning and civil engineering firm. Respondent Charlotte County called no witnesses.

Petitioner's Exhibits 1, 3-8, 10, 12-16, 18, 20-28, and 34-36 were admitted into evidence. Respondents MRP Land Trust and Riverwood LDC's Exhibits 1-8 were admitted into evidence. Respondent Charlotte County offered no exhibits.

A transcript of the final hearing was filed at the Division of Administrative Hearings on February 2, 1998, and the parties filed proposed recommended orders on February 19, 1998.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following findings of fact are made:

1. Petitioner, the Department of Community Affairs ("DCA"), is the state land planning agency with the power and duty to enforce and administer Chapter 380, Florida Statutes.

2. "Riverwood" is a Mixed Use Master Plan Development of

Regional Impact ("DRI") located on approximately 1,265 acres adjacent to the Myakka River in Charlotte County. The parcel is more specifically located in Township 40 South, Range 21 East, Sections 17, 20, 21, 28 and 29, in Charlotte County.

3. Respondent MRP Land Trust is the owner of the property. Respondent Riverwood LDC is the developer of the property.

4. Respondent Charlotte County is a political subdivision of the State of Florida and, through its Board of County Commissioners, is responsible for issuing development orders for properties in unincorporated Charlotte County, pursuant to Section 163.3171, Florida Statutes. Riverwood falls within this jurisdiction.

5. On November 13, 1990, the Charlotte County Board of County Commissioners adopted Resolution Number 90-285, approving the MDO for the Riverwood DRI, pursuant to Chapter 380, Florida Statutes. Resolution Number 90-285 provided conceptual approval of the following uses on the property: 3,300 residential units; 334,000 square-feet of commercial development; an 18-hole golf course; a marina; wet-slip docking; and 264 acres of open space. The MDO also called for a utility site to accommodate the wastewater treatment facility, a golf course maintenance area, irrigation facilities, storage for boats and recreational vehicles, and potentially a potable water supply tank.

6. The MDO called for the property to be developed in a number of increments. Each increment would require, prior to actual development, the issuance of an Incremental Development Order by Charlotte County. Resolution Number 90-285 set forth the various criteria that must be met prior to issuance of each development order.

7. Also on November 13, 1990, the Charlotte County Board of

County Commissioners adopted Resolution Number 90-286, the Increment One DO, encompassing approximately 752 acres of the subject property. Increment One included 1,100 residential dwelling units, 140,000 gross square-feet of commercial development, and the 18-hole golf course.

8. During the application process for the MDO and the Increment One DO, two bald eagles' nests were discovered on the Riverwood property, including one nest on a portion of the Increment One property adjacent to the Myakka River (the "river eagle" nest).

9. Resolution Number 90-285 placed certain conditions, restrictions and limitations on the MDO. In recognition of the discovery of the bald eagles' nests, Resolution Number 90-285 placed the following condition on the MDO:

Land uses within the primary and secondary Bald Eagle zones shall be consistent with the Bald Eagle Habitat Management Plan to be approved by Charlotte County through the appropriate F.S. Chapter 380 development order amendment procedures at a later date.

10. In order to proceed with approval of the Increment One DO without the delay that would be caused by waiting for the development of the Bald Eagle Habitat Management Plan, Riverwood LDC voluntarily excluded a 67.6 acre-parcel surrounding the river eagle's nest from its application for the Increment One DO.

11. A draft of the Bald Eagle Management Plan was submitted to the Florida Game and Fresh Water Fish Commission ("FGFWFC"), Charlotte County, and the Southwest Florida Regional Planning Council in October 1990. The final version of the Bald Eagle

Management Plan, adjusted to reflect the comments of the named agencies, was submitted on April 2, 1991.

12. The Plan provided for primary and flyway zones in which no activity would be allowed during the October 1 through May 15 nesting season, and in which only passive recreational uses would be allowed during the remainder of the year. The Plan also provided for secondary zones, in which residential and golf course uses would be allowed, though construction would be restricted during the nesting season.

13. For purposes of this proceeding, the following portions of the Plan, as amended by Charlotte County Resolution Number 91-268, adopted on October 22, 1991, are relevant:

III. Plan Approach

The Riverwood DRI was filed and reviewed as an Application for Master Development Approval (AMDA). An Application for Incremental Development Approval (AIDA) for Increment One was submitted and reviewed concurrently with the AMDA.

Only that part of the Riverwood DRI which is within Increment One can be considered for development approvals. Any parcels within the remainder of the Riverwood DRI will be required to submit an Application for Incremental Development Approval to the Southwest Florida Regional Planning Council for detailed review prior to any development approval.

This Bald Eagle Management Plan applies only to Increment One. Within the primary, secondary or flyway zones located outside Increment One..., it also provides recommendations on avoiding the disturbance of nesting bald eagles. It does not address permanent habitat protection for eagles in those areas, however, and is therefore subject to future review and revision regarding that issue.

For those areas outside Increment One, including those areas within the primary,

secondary and flyway zones, the Applicant acknowledges that prior to development in those areas, a future Application for Incremental Development Approval must be filed and that DRI review of bald eagle habitat and management will take place pursuant to the laws, rules and regulations governing the DRI process in effect at the time of the review.

* * *

IX. Abandoned Nests

The land use criteria related to either the lake eagle pair or the river eagle pair remain in effect until the nest is abandoned for a period extending at least through five consecutive breeding seasons of non-use. Once either of the nests has been abandoned, as defined herein, the restrictions imposed in this document on the primary zone(s), flyway zone(s), and secondary zone(s) associated with that nest are vacated.

Determination of abandonment under this Section shall be made by the Florida Game and Fresh Water Fish Commission, Office of Environmental Services upon application made by, and considering factual evidence provided by, the Applicant. Notice of the application shall be simultaneously provided by the Applicant to the Southwest Florida Regional Planning Council and the Department of Community Affairs who may also provide evidence for Florida Game and Fresh Water Fish Commission's consideration on the matters if they so desire.

In the event that a future Application for Incremental is filed for development in the primary or flyway zones because a nest has been determined to be abandoned, the Applicant acknowledges that that DRI review of bald eagle habitat management will take place pursuant to the laws, rules, and regulations in effect at the time of the review. The reviewing agencies will not be deemed to have waived their rights to apply those laws, rules, and regulations by virtue of this Bald Eagle Management Plan having been previously approved.

14. Section 380.06(19), Florida Statutes, sets forth the circumstances under which proposed changes to previously approved DRIs must undergo further DRI review. Those circumstances generally are changes to a DRI creating a reasonable likelihood of additional regional impact, or regional impacts created by the change that have not been previously reviewed by the regional planning agency. Such circumstances are referred to as "substantial deviations."

15. The statute provides that some circumstances conclusively create substantial deviations, while others merely establish a rebuttable presumption that a substantial deviation has been created.

16. The bald eagle is listed as a state threatened species in Chapter 39, Florida Statutes (or federal listed animal species in 50 C.F.R. 17.11-12). Section 380.06(19)(b)16, Florida Statutes, provides the following substantial deviation standards in regards to development impacts on protected plant and animal species caused by changes in previously approved DRIs:

(b) Any proposed change to a previously approved development of regional impact or development order condition which, either individually or cumulatively with other changes, exceeds any of the following criteria shall constitute a substantial deviation and shall cause the development to be subject to further development-of-regional-impact review without the necessity for a finding of same by the local government:

* * *

16. Any change which would result in

development of any area which was specifically set aside in the application for development approval or in the development order for preservation or special protection of endangered or threatened plants or animals designated as endangered, threatened, or species of special concern and their habitat, primary dunes, or archaeological and historical sites designated as significant by the Division of Historical Resources of the Department of State. The further refinement of such areas by survey shall be considered under sub-subparagraph (e)5.b.

17. The referenced sub-subparagraph of Section 380.06(19), Florida Statutes, provides:

5. The following changes to an approved development of regional impact shall be presumed to create a substantial deviation. Such presumption may be rebutted by clear and convincing evidence.

* * *

b. Except for the types of uses listed in subparagraph (b)16., any change which would result in the development of any area which was specifically set aside in the application for development approval or in the development order for preservation, buffers, or special protection, including habitat for plant and animal species, archaeological and historical sites, dunes, and other special areas.

18. Read together, the quoted subparagraphs of Section 380.06(19), Florida Statutes, appear to establish that a change which would result in development of an area set aside for preservation or protection of endangered, threatened, or species of special concern and their habitat is conclusively presumed to create a substantial deviation, whereas a change resulting in development of an area set aside for preservation, buffers or special protection of other species would create only a

rebuttable presumption of a substantial deviation. An area subject to the conclusive presumption of subparagraph (b)16 may be considered under the rebuttable presumption of subparagraph (e)5.b if it is "further refined" by survey.

19. Rule 9J-2.041, Florida Administrative Code, titled "Listed Plant and Wildlife Resources Uniform Standard Rule," is DCA's rule implementing the statutory provisions quoted above. Subsection (6)(c) of the rule provides:

Development of an onsite preservation or special protection area previously set aside in an ADA [Application for Development Approval] or DRI development order for listed species, or their habitat, designated as endangered, threatened, or species of special concern shall be allowed only under any conditions allowing such development in a previously approved final DRI development order, or if approved after review of a substantial deviation ADA, in compliance with Subparagraph 380.06(19)(b)16., F.S., proposing a change from onsite preservation to any necessary appropriate mitigation, pursuant to the criteria and provisions of this rule.

20. Rule 9J-2.041(2)(e), Florida Administrative Code, defines "habitat" as "the place or type of site where a species lives and includes any area that is associated with the life history requirements of a particular listed plant or animal species."

21. "Habitat" is thus not restricted to the actual location of an eagle's nest, but includes any area associated with the eagle's life history requirements.

22. The bald eagle is a bird of aquatic ecosystems, and requires suitable perching and nesting sites within two miles of

water. Eagle nesting territories are typically found along the coasts, major lakes, and rivers of Florida. Because eagles tend to use various nests within their established territories, protection of the territory is considered more important than protection of the nest itself, from a biological and habitat standpoint.

23. The study on which the Bald Eagle Management Plan was based recognized the importance of habitat protection, recommending habitat improvement and mitigation giving priority to the areas included in the primary and secondary protection zones. This study, commissioned by the developer and performed by Dr. Jeffrey Lincer of Eco-Analysts, Inc., was included as an Appendix to the Bald Eagle Management Plan.

24. Rule 9J-2.041, Florida Administrative Code, sets forth standards for the avoidance and mitigation of "significant impacts" to listed plant and animal species caused by development, and establishes thresholds for determining when a given development activity constitutes a "significant impact." Relevant to this case is Rule 9J-2.041(4)(b)1., Florida Administrative Code, which provides:

(b) SIGNIFICANT IMPACT. In order of priority use for this rule, a significant impact shall consist of:

1. A Guideline Established Impact. Where a listed wildlife species guideline has been prepared to address developmental impacts on that listed species by either the Florida Game and Fresh Water Fish Commission (FGFWFC), the Florida Department of Environmental Protection (DEP), or the U.S. Fish and Wildlife Service, the impact criteria established in the guideline shall be considered by the Department to constitute a significant impact, consistent with any project specific recommendations by FGFWFC or the DEP to utilize the guidelines under its listed species jurisdiction for the onsite and offsite impacts of the specific Chapter 380, F.S., land use application under review, pursuant to this rule.

25. DCA has adopted the "Habitat Management Guidelines for

the Bald Eagle in the Southeast Region," by the U.S. Fish and Wildlife Service, as one of the "listed wildlife species guidelines" referenced above. Rule 9J-2.041(2)(o)4., Florida Administrative Code.

26. The river eagle nest remained active and occupied for some time after adoption of the Bald Eagle Management Plan. However, the FGFWFC observed that the nest was last used by nesting eagles during the 1990-91 nesting season. The nest was damaged during the March 1993 "no name" storm, and only remnants remained during the 1993-94 nesting season.

27. The U.S. Fish and Wildlife Service guidelines recommend continued protection of an abandoned nest site for at least two complete breeding seasons after the loss. By letter dated December 14, 1995, the U.S. Fish and Wildlife Service declared the river eagle nest "lost," and stated that the primary and secondary protection zones implemented by the Bald Eagle Management Plan could be discontinued.

28. Riverwood LDC on March 25, 1997, submitted to the Southwest Florida Regional Planning Council a Notice of Proposed Change (NOPC) to a Previously Approved DRI, and a revision thereto on May 1, 1997. By its May 1, 1997, revision, Riverwood LDC sought to add for residential development the 67.6 riverfront acres that were subject to the Bald Eagle Management Plan, and to delete the bald eagle management area from the Increment One DO.

29. Section 380.06(19)(f), Florida Statutes, provides that a developer may submit an NOPC for a previously approved DRI.

The NOPC is applicable to situations in which the proposed change does not create a substantial deviation causing the need for further DRI review. The developer is required to submit the NOPC simultaneously to the local government, the regional planning agency, and DCA. After a public hearing and comment from the appropriate regional planning agency or DCA, the local government decides whether the proposed change in fact creates a substantial deviation. The local government's decision is subject to the appeal provisions of Section 380.07, Florida Statutes.

30. By letter to the Southwest Florida Regional Planning Council dated May 2, 1997, Bradley J. Hartman, Director of the Office of Environmental Services for the FGFWFC, submitted his agency's comments on the proposed NOPC. Mr. Hartman expressed his agency's long-standing concerns over the protection of eagle habitat, as opposed to mere nest protection, on the Riverwood site. He made specific reference to the Bald Eagle Management Plan's requirement that prior to development in areas covered by the plan, an AIDA must be filed and DRI review of bald eagle habitat and management must take place.

31. Mr. Hartman recommended that habitat within this former nesting territory be set aside as a permanent conservation area and managed for bald eagles and other wildlife species on the site, and that a conservation easement be granted to his agency or to the U.S. Fish and Wildlife Service to implement those recommendations.

32. By letter dated May 9, 1997, to the Charlotte County

Planning Department, J. Thomas Beck, Chief of the Bureau of Local Planning of DCA, informed Charlotte County that DCA objected to the NOPC pursuant to Section 380.06(19)(c), Florida Statutes, and Rule 9J-2.025, Florida Administrative Code. The reasons for the objection were the inclusion of new dwelling units in existing residential areas without proper review and approval, deletion of the bald eagle management area without approval by the FGFWFC, and development in the bald eagle management area without proper review and approval.

33. James I. Crews, the DCA planner with day-to-day responsibility for this NOPC, testified that DCA's objections were the result of his review of the NOPC and the applicable statutes and rules.

34. Mr. Crews testified that after the May 9, 1997, objection letter was issued, he received a letter from Steven C. Hartsell, the attorney for Riverwood LDC, clarifying the NOPC and addressing some of DCA's concerns. Mr. Hartsell's letter, dated June 10, 1997, pointed out that the 67.6 acres in question was part of the MDO and was pulled out of the Increment One boundary for future agency review should the river eagle nest be abandoned. The letter stated that, in light of the more than five-year abandonment of the nest site, the issue in the NOPC should be confined to whether the proposed residential development and removal of the bald eagle management plan restrictions would create a reasonable likelihood of additional regional impact not previously reviewed. The letter attached the

correspondence referenced above regarding the U.S. Fish and Wildlife Service's determination that the river eagle nest was "lost."

35. In his letter, Mr. Hartsell strenuously argued that the express terms of the Bald Eagle Management Plan did not require that any property be set aside for permanent bald eagle habitat. Rather, he argued, the plan "simply left the door open" for the relevant agencies to require permanent habitat if the applicable rules or regulations were ever changed to require permanent habitat. Because the nest was abandoned, Mr. Hartsell concluded, the 67.6 acres was no longer an area of state or regional significance for any endangered or threatened species.

36. Mr. Hartsell also disputed the suggestion that this application might be forced to go through the AIDA process rather than the NOPC process, stating that the applicant here had attempted to provide the same level of information as would be required in an AIDA and pointing out that the 67.6 acres had been previously surveyed and reviewed during the original MDO and Increment One DO process. He concluded that the NOPC process seemed reasonable, given that the property had already been surveyed for species and that no additional development density had been requested.

37. Mr. Crews drafted a DCA response to Mr. Hartsell, issued over the signature of J. Thomas Beck on June 24, 1997. The response expressed DCA's acceptance that the river eagle nest was in fact abandoned. However, the response also noted that

there had not been a vegetation and wildlife survey conducted on the subject property since the MDO and Increment One DO were adopted on November 13, 1990. The response concluded that:

the proposed deletion of the Bald Eagle Management Plan area along the Myakka River may still create a substantial deviation because it will result in the development of an area specifically set aside in the DO for preservation or special protection of a listed animal or its habitat. At the very minimum, a thorough new survey is required for this portion of the DRI prior to completion of the NOPC review. Based on the survey's findings, additional DO conditions may be necessary to address vegetation and wildlife issues.

38. Mr. Crews testified that, after the June 24 letter was sent, he was contacted by Mr. Hartsell, who told him that Riverwood LDC was going to prepare a new vegetation and wildlife species survey for the 67.6 acres in question. To expedite consideration of the survey, DCA made arrangements with Riverwood LDC to have the survey results sent directly to the relevant commenting agencies: the FGFWFC; the Florida Natural Areas Inventory; and the DRI coordinators for both Charlotte County and the Southwest Florida Regional Planning Council.

39. The Listed Species Survey Report for the 67.6 acre-site was performed by Bruce Layman of Wilson, Miller, Barton & Peek, Inc., on July 1-8, 1997, and was submitted to the various agencies on July 8, 1997. The survey was conducted over five days of morning and afternoon transects for listed flora and fauna, with particular attention to the species targeted by those lists. The report stated that "particular attention" was given

to the potential presence of bald eagles, given their known existence in the area, but found no signs of nesting or perching activities.

40. Mr. Crews testified that his agency received comments on the survey report from the FGFWFC and from the Florida Natural Areas Inventory, and recalled that those agencies expressed concern about its adequacy.

41. The Florida Natural Areas Inventory, in a memorandum to Mr. Crews dated July 11, 1997, expressed concern that the survey report did not include the list of species "targeted" for field investigation, or any statement as to how the list was derived or whether seasonal considerations were made in developing the list. The memorandum was also critical of the fact that the survey was taken over a single week in July, and that the site visits occurred mostly during the same early afternoon hours, when many species of birds and mammals may not be active.

42. Ms. Kimberly Dryden, a biological scientist with the FGFWFC and an expert in wildlife habitat and listed species surveys, echoed these concerns in her testimony. She found that the survey was not consistent with acceptable practice as to both the season in which it was conducted and the time of day in which the site visits were made.

43. Ms. Dryden testified that, if one did not want to find anything on the site, one would do what was done here: conduct a survey in July, during the middle of the wet season, and during the hottest part of the day in a tropical area of the United

States.

44. Ms. Dryden testified that the survey methodology was not consistent with the FGFWFC's Wildlife Methodology Guidelines, and not consistent with any professional survey technique she has reviewed and accepted.

45. Ms. Dryden found no indication in the survey report or the included maps that the surveys had been meandered in accordance with the Guidelines. While the survey report indicated that nearly three times the recommended square footage had been surveyed, Ms. Dryden stated that the Guidelines place less emphasis on the raw square footage than on knowing whether the survey was meandered to cover a representative sample of the entire site.

46. Ms. Dryden noted that the report made a general statement that the survey had been conducted in accordance with the Guidelines, but she found no detail included that would permit a third party to confirm that the Guideline methodologies had in fact been followed.

47. Ms. Dryden testified that the Guidelines were written to provide cursory survey recommendations for DRI applicants, and that the typical listed species survey submitted exceeds the minimum standards set forth in the Guidelines. She found that this survey did not meet even the minimum standards set forth in the guidelines.

48. Ms. Dryden testified that the surveyor should collect historical information on the site, to know what species may be

there. She testified that the Guidelines call for morning and evening surveys, conducted as randomly as possible to ensure that no repeat surveys occur and there is as much chance as possible to pick up all the wildlife on the site. The survey report did not indicate that the Guidelines were followed in these respects.

49. Ms. Dryden noted that the report included no discussion or identification of eagle habitat, and did not outline the history of eagles on the site. She also testified that July is the wrong time to survey for bald eagles in South Florida, because bald eagles tend to migrate after they have completed their nesting activities in the spring.

50. Ms. Dryden stated that, as part of the preapplication process for an Application for Master Development Approval, an applicant is required to provide a list of potential species on the site. No such list was provided with this survey report.

51. Mr. Layman, who conducted the survey, admitted that the list of species he was looking for was "mentally based," i.e., it was in his head, not on paper. He testified that this list was based on his experience working on this project and his familiarity with sites in other counties in the same region of Florida.

52. Mr. Layman disagreed with Ms. Dryden's criticisms regarding the methodology of the survey. He noted that the survey was not conducted in a vacuum, and that no attempt was made to recreate all the work that had been performed in prior surveys conducted as part of the MDO and Increment One DO

process. Based on that earlier work, he already had an idea as to which listed species he might find on the site.

53. Mr. Layman also disagreed with Ms. Dryden's criticism as to the timing of the survey. He agreed that July would not be the right time to look for nesting eagles, but he stated that neither the time of day or time of year would affect the search for general bald eagle activity. He testified that, in South Florida, eagles that have established a territory stay in the region year round, and are active throughout the day.

54. Mr. Layman testified that he found no evidence of recent bald eagle activity of any kind on the 67.6 acre-site. There were no nests, no evidence of roosting, and none of the usual signs indicating that eagles were feeding in the area.

55. Mr. Layman admitted that the Guidelines call for morning and afternoon transects of the site, and that he did not perform morning and afternoon transects. However, he testified that in his five years of performing protected species surveys, he has seen such morning and afternoon transects recommended in practice only for red cockaded woodpeckers. Because that species is not on the subject property, there was no need to perform a morning and evening survey to be sure he was seeing everything.

56. On balance, the criticisms voiced by Ms. Dryden are well taken. Mr. Layman's explanations and justifications of his methods, even if reasonable, were rationalizations of the admitted shortcomings of his survey report.

57. There was no list of anticipated species developed

prior to the survey and published in the report. Four out of the five site visits were conducted at the same time of day, and none of the visits were conducted prior to 9 a.m. or after 3:30 p.m. The survey was mostly conducted in the early afternoon on summer days in South Florida, when the temperature was in excess of 90 degrees.

58. The survey report provides no detail as to how the transects were determined or to what extent the survey was randomized to ensure adequate coverage of the site as a whole.

59. The report states that the survey methods "meet, or exceed, the Florida Game and Fresh Water Fish Commission's Wildlife Methodology Guidelines published in January 1988," but that statement must be accepted largely on faith. A third party could not read the contents of the survey report and state with any degree of confidence that the Guidelines were in fact followed.

60. The circumstances under which the survey was conducted support a finding that its conclusions are suspect at best. The decision to conduct the survey could have been made by Riverwood LDC no sooner than June 24, 1997, the date of Mr. Beck's letter to Mr. Hartsell suggesting such a survey. Less than one week later, Mr. Layman was actually in the field conducting the survey, leading to the inference that only minimal preparatory work could have been performed prior Mr. Layman's taking to the field. This would explain the missing information regarding what species were being sought.

61. Further, the survey report was submitted on July 8, 1997, despite its textual indication that Mr. Layman was still in the field as late as 11 a.m. on that date. This observation leads to the inference that the preparation of the report was rushed, and may explain the cursory nature of the survey report.

62. Mr. Layman pointed out that in April 1997, he performed a listed species survey for a different 26.5 acre-site on the Riverwood property, using the same methodology and the same reporting form as he used for the 67.6 acre-site, and that all reviewing agencies accepted it without criticism.

63. From this, Riverwood LDC argues that it is unfair to apply a more stringent standard to the survey conducted on the 67.6 acre-site, and that a double standard is being applied here in the effort improperly to require Riverwood LDC to grant permanent preservation status to the 67.6 acre-site.

64. However, the 26.5 acre-site in question had already been disturbed by development, with a man-made lake in the center of the property, and a network of roads and ditches in place. Exotic plants such as Brazilian pepper, melaleuca and wax myrtle dominated many portions of the site. None of this acreage was even arguably bald eagle habitat.

65. It would not have been unreasonable for the FGFWFC and other reviewing agencies to accept a less thorough survey of this heavily disturbed area than it would accept for a relatively pristine riverfront area known to have been the historic home of bald eagles.

66. The original Resolution Number 90-285, which restricted land-use development within the primary and secondary bald eagle zones, required development of a "Bald Eagle Habitat Management Plan." Whether through inadvertence or design, the word "habitat" was dropped when the Plan was actually adopted.

67. Nonetheless, the Plan's language makes clear that it was designed not merely to shield the river eagle nest from undue encroachment by development, but to provide protection of the habitat in the 67.6 acre-portion of Riverwood that was voluntarily severed from the Increment One DO.

68. While it expressly stated that the Plan did not address "permanent habitat protection for eagles" in Increment One, the Plan did require that "DRI review of bald eagle habitat management will take place pursuant to the laws, rules, and regulations in effect at the time of the review," should the nest itself ever be determined to have been abandoned, and that such DRI review would occur pursuant to an AIDA filed by the developer.

69. These provisions of the Plan were consistent with Section 380.06(19)(b)16., Florida Statutes, which conclusively finds a "substantial deviation" occurs when a proposed change to a previously approved DRI results in development of "any area which was specifically set aside in the application... for preservation or special protection of endangered or threatened plants or animals designated as endangered, threatened, or species of special concern and their habitat . . .".

70. Even accepting Riverwood LDC's contention that Section 380.06(19)(e)5.b., Florida Statutes, negates the conclusiveness of the presumption of a "substantial deviation" by allowing "refinement by survey," and thus permits the applicant to demonstrate by clear and convincing evidence that this change would not cause a substantial deviation, Riverwood LDC has not met that burden in this case.

71. As of the date the Bald Eagle Management Plan was put in place, the 67.6 acres at issue were bald eagle habitat. The nesting eagles lived there. To overcome the presumption of a substantial deviation and demonstrate its entitlement to proceed under the less stringent NOPC process, rather than the DRI review contemplated by the AIDA process, Riverwood LDC would be required to demonstrate that this acreage was no longer bald eagle "habitat," as that term is defined by Rule 9J-2.041(2)(j), Florida Administrative Code.

72. The undisputed demonstration that the river eagle nest has been abandoned, and the U.S. Fish and Wildlife Service's official declaration that it is a "lost" nest, do not alone demonstrate that the 67.6 acre-tract is no longer bald eagle "habitat," because the definition of "habitat" covers more than nesting activities.

73. The survey was suggested by DCA in an effort to assist Riverwood LDC to demonstrate that the area was no longer bald eagle habitat, and thus avoid an appeal of the development order by DCA. For the reasons stated above, the survey is inherently

unreliable and cannot be used as evidence that this area is no longer bald eagle habitat.

74. DCA's efforts to assist Riverwood LDC in its attempted expediting of its application did not constitute approval of Riverwood LDC's decision to pursue the NOPC process rather than the AIDA process. DCA was entitled to review the results of the survey, as well as the comments thereon by the FGFWFC and the Florida Natural Areas Inventory, prior to reaching a final conclusion that Riverwood LDC's proposed addition of the 67.6 acre-tract to the Increment One DO constituted a "substantial deviation."

75. It is not DCA's typical practice to request submission of listed species reports as part of the NOPC process. Mr. Crews characterized it as a "very unorthodox approach." The wisdom of its request is questionable, given that it arguably led the developer to believe that DCA approved its use of the NOPC process rather than the AIDA, or at least that DCA was treating this NOPC as a de facto AIDA.

76. However, DCA's suggestion that a thorough wildlife survey be conducted did not, and could not, estop DCA from later performing its statutorily mandated duty of appealing what it perceived to be an improperly adopted development order.

77. Mr. Hartsell, Riverwood LDC's representative, testified that there was never any agreement by his client to provide permanent habitat protection for the 67.6 acres. This is accepted as true, but does not contradict the plain language of

the Bald Eagle Management Plan, which unequivocally calls for DRI review of future development applications in any abandoned eagle nest area.

78. By letter dated July 15, 1997, Bradley Hartman of the FGFWFC informed Mr. Crews of DCA Affairs that his office had reviewed the survey report submitted by Riverwood LDC, and that the comments contained in his letter of May 2, 1997, remained applicable. Mr. Hartman stated that, although bald eagles were not observed during the survey, the pinelands in the vicinity of the abandoned river eagle nest provide documented habitat for the species, and the FGFWFC continues to recommend that the area be protected with a conservation easement and managed for bald eagles and other wildlife species on the site.

79. By letter dated July 25, 1997, from J. Thomas Beck to Matthew DeBoer, Chairman of the Charlotte County Board of County Commissioners, DCA strongly encouraged Charlotte County to consider the comments of the FGFWFC and the Florida Natural Areas Inventory, and to designate a preservation area in the vicinity of the abandoned river eagle nest.

80. Despite the concerns voiced by DCA and the FGFWFC, the Charlotte County Board of County Commissioners thereafter adopted the subject resolutions, finding that no substantial deviation would be caused by adding the 67.6 acre-tract to Increment One and abolishing the bald eagle protection areas established by its earlier resolutions.

CONCLUSIONS OF LAW

81. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569, 120.57, 380.07, Florida Statutes, and Chapter 42-2, Florida Administrative Code.

82. DCA has the authority and discretion to appeal any local government development order regarding a DRI within 45 days after the development order is rendered to DCA. Section 380.07(2), Florida Statutes; Rule 9J-2.026, Florida Administrative Code.

83. Charlotte County Resolution Number 97-0870A0 and Charlotte County Resolution Number 97-0860A0 are "development orders" within the meaning of Section 380.07, Florida Statutes. See Section 380.031(3), Florida Statutes (defining the term "development order").

84. The Charlotte County resolutions do not meet the requirements of Chapter 380, Florida Statutes, or Chapter 9J-2, Florida Administrative Code, in that they find that the proposed amendments to the MDO and the Increment One DO do not constitute a "substantial deviation" from the terms of the existing MDO and Increment One DO.

85. The 67.6 acre-parcel proposed to be added to the Increment One DO was unquestionably bald eagle habitat at the time the MDO and the Increment One DO were originally adopted. While the evidence in this proceeding demonstrated that the river eagle nest located on the parcel was abandoned, the evidence

produced by Respondents did not demonstrate that this parcel is no longer bald eagle "habitat," i.e., an "area that is associated with the life history requirements" of the bald eagle. Rule 9J-2.041(2)(e), Florida Administrative Code.

86. The Bald Eagle Management Plan specifically set aside the 67.6 acre-parcel for preservation or special protection of the bald eagle, a threatened species. The Bald Eagle Management Plan was developed and approved as part of the MDO and the Increment One DO.

87. Section 380.06(19)(b)16., Florida Statutes, provides that any change to a previously approved DRI or development order condition which would result in the development of an area specifically set aside in the application for development approval or in the development order for preservation or special protection of a threatened animal species "shall constitute a substantial deviation" and shall cause the development to be subject to further DRI review.

88. The proper format for obtaining approval of a change constituting a substantial deviation is to submit an AIDA.

89. This proposed amendment to the MDO and the Increment One DO could not be approved by way of an NOPC, because the addition of the 67.6 acres to Increment One conclusively constituted a "substantial deviation."

90. The terms of the Bald Eagle Management Plan itself required the developer to submit an AIDA prior to development approval for acreage covered by the Plan.

91. Riverwood LDC contends that the NOPC, considered with the survey information produced at the request of DCA and the FGFWFC and with all the information submitted with its earlier applications, provided all the information that an AIDA would have required. Therefore, Riverwood LDC contends, it elevates form over substance to find that an AIDA should have been submitted in this case.

92. The evidence demonstrates that Riverwood LDC did not submit everything that would be required by an AIDA. At the very least, the listed species survey it submitted was inadequate to demonstrate Riverwood LDC's main contention: that the 67.6 acres was no longer bald eagle habitat. Thus, even accepting Riverwood LDC's legal argument that Section 380.06, Florida Statutes, allowed it to rebut the presumption of "substantial deviation," Riverwood LDC failed to marshal the clear and convincing evidence required to make that rebuttal.

93. The claim that DCA is elevating form over substance ignores the fact that there is substance to the form. The Legislature has provided a clear, substantive distinction between an NOPC and an AIDA. In attempting to avoid the more stringent DRI review contemplated by the AIDA process, Riverwood LDC has relied on a simple proposition: the Bald Eagle Management Plan was developed and adopted for the sole purpose of protecting an eagle's nest; the nest no longer exists, therefore the Bald Eagle Management Plan is a nullity. The acreage protected by the Plan should revert to Increment One and become part and parcel of that

Development Order, pursuant to the less exacting NOPC process.

94. The testimony of Mr. Hartsell indicates that this simple proposition was Riverwood LDC's intent from the outset of this DRI process. However, the actual documents generated during that process--the various Charlotte County resolutions and the

Bald Eagle Management Plan itself--do not support Riverwood LDC's proposition.

95. Whatever Riverwood LDC's intent, the documentary record convincingly demonstrates that the concern underlying the Bald Eagle Management Plan was not merely an eagle's nest sitting in a given tree, but protecting the habitat of the bald eagles in that area.

96. Potential abandonment of the nest was specifically contemplated by the Plan. While the Plan states that abandonment would operate to vacate the restrictions imposed in the primary, flyway, and secondary zones associated with the nest, it goes on to state an AIDA must be filed for development in those vacated zones and that "DRI review of bald eagle habitat management will take place pursuant to the laws, rules and regulations in effect at the time of the review." It is precisely that Plan-mandated "DRI review" that Riverwood LDC seeks to avoid by pursuing the NOPC process.

97. Riverwood LDC cannot avoid the plain requirements of Chapter 380, Florida Statutes; of Chapter 9J-2, Florida Administrative Code; and of a Bald Eagle Management Plan that the developer itself prepared and voluntarily accepted as a binding restriction on its project.

98. Finally, Riverwood LDC makes the legal argument that the development order it seeks here is a "license" subject to the provisions of Section 120.60, Florida Statutes. Riverwood LDC argues that, because it provided all the information requested by

DCA during the NOPC process, Section 120.60(1), Florida Statutes,

forbids DCA from denying the "license" for failure to supply additional information.

99. A development order issued by a local government is not a license as defined by Section 120.52(9), Florida Statutes. Even accepting arguendo that a development order is akin to a license, Riverwood LDC's analogy fails because DCA is not the agency empowered to approve or deny this "license application."

100. Even if Section 120.60, Florida Statutes, had some application to this proceeding, the specific requirements of Section 380.07(2), Florida Statutes, would govern the general procedural requirements set forth in Section 120.60, Florida Statutes. Palm Harbor Special Fire Control Dist. v. Kelly, 500 So. 2d 1382, 1386 (Fla. 2d DCA 1987), affirmed 516 So. 2d 249 (Fla. 1987)(where two different legislative enactments generally apply, but only one specifically applies, the specific enactment governs over the general).

101. DCA's earlier requests for information from Riverwood LDC did not negate DCA's statutory authority to appeal the development order to the Florida Land and Water Adjudicatory Commission. Riverwood LDC's contention that this is a licensing proceeding is without merit.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is recommended that the Florida Land and Water Adjudicatory Commission enter a final order declaring that Charlotte County Resolution Number 97-0870A0 and Charlotte County Resolution

Number 97-0860A0 are inconsistent with Chapter 380, Florida Statutes; Chapter 9J-2, Florida Administrative Code; and the Bald Eagle Management Plan described in the foregoing; denying permission to proceed under those Resolutions; and issuing a final development order consistent with the provisions of Chapter 380, Florida Statutes.

DONE AND ENTERED this 13th day of April, 1998, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of April, 1998.

COPIES FURNISHED:

Shaw P. Stiller, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Kenneth G. Oertel, Esquire
Oertel, Hoffman, Fernandez
& Cole, P.A.
Post Office Box 6507
Tallahassee, Florida 32314-6507

Steven C. Hartsell, Esquire
Post Office Drawer 1507
Ft. Myers, Florida 33902-1507

Carl Kitchner
Assistant County Attorney
Charlotte County

118500 Murdock Circle
Port Charlotte, Florida 33948-1094

Stephanie Gehres Kruer
General Counsel
Department of Community Affairs
Suite 325-A
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.