STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BERT ALLEN WAHL, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 98-4974
	)	98-4975
FLORIDA FISH AND WILDLIFE	)	98-4976
CONSERVATION COMMISSION,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

On October 8, 1999, a formal administrative hearing was held in this case by televideo in Tallahassee and Tampa, Florida, before William R. Pfeiffer, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph R. Fritz, Esquire
4204 North Nebraska Avenue
Tampa, Florida 33603

For Respondent: Preston T. Robertson, Esquire
Florida Fish and Wildlife
Conservation Commission
620 South Meridian Street
Tallahassee, Florida 32399-1600

STATEMENT OF THE ISSUES

Whether Respondent properly denied the applications of Petitioner for Class I wildlife; and whether Respondent's previous granting of Class I licensure to Petitioner estops Respondent from denying the instant applications.

PRELIMINARY STATEMENT

The Florida Fish and Wildlife Conservation Commission informed Petitioner on September 22, 1998, of his denial of three applications for Class I wildlife. The denial was based on Petitioner's failure to meet the lawful land requirements and inadequate caging located at the proposed sites.

At the hearing on October 8, 1999, Respondent presented the testimony of Linda Harrison, Steve DeLacure, and Linda Coomey. Petitioner presented the testimony of Bert Wahl. Petitioner's Exhibits 1-5, and Respondent's Exhibits 1-3, 5-14, and 19-21 were admitted into evidence.

The testimony of Dennis Parker, taken by deposition on September 29, 1999, in Tampa, Florida, was received without objection.

Both parties requested a transcript of the final hearing, and the parties were given 14 days from the filing of the Transcript in which to file proposed recommended orders. The transcript was filed on November 1, 1999.

FINDINGS OF FACT

1. On July 15, 1998, Petitioner applied to the Commission for licenses, via three separate applications, to possess wildlife, particularly bears, leopards, and baboons at three separate locations.

2. The applications cited the addresses of 127 West Hiawatha Street, 116 West Elm Street, and 6802 North Highland

Avenue, all in Tampa, Florida, as the locations where Petitioner planned to possess the animals. Petitioner applied to possess bears (family ursidae), leopards (family felidae) and baboons (family cercopithecidae) at each location. All these animals are Class I wildlife.

3. Respondent issued Notices of Denial of the three applications to Petitioner on September 22, 1998.

4. Class I animals are dangerous animals that cannot be possessed for personal use, and are typically found in zoos. They are dangerous because of their ferocity and size. These animals may be aggressive towards anyone, including their keeper.

5. Class II wildlife are potentially dangerous animals which should only be possessed by experienced individuals.

6. Class III animals are of smaller size and are less aggressive.

7. The goal of the Commission's classification system is to promote the safehousing of wildlife, and to protect the general public and the individual keeping the animals.

8. In the application for 116 West Elm Street, Petitioner noted that he presently possessed five white-tailed deer, one muntjac, and one emu, all Class III wildlife. Petitioner did not possess authorization to house Class I wildlife at 116 West Elms Street, the year previous to the instant application.

9. In the application for 127 West Hiawatha Street, Petitioner noted that he presently possessed two panthers and one

bobcat, both Class II wildlife, and two alligators, which are Class III wildlife. Petitioner did not possess authorization to house Class I wildlife at 127 West Hiawatha Street the year previous to the instant application.

10. In the application for 6802 North Highland Avenue, Petitioner noted that he presently possessed no wildlife at this location. Petitioner did not possess authorization to house Class I wildlife at 6802 North Highland Avenue the year previous to the instant application.

11. Two of Petitioner's locations are contiguous: 127 West Hiawatha Street, and 166 West Elm Street.

12. Petitioner's location at 6802 North Highland Avenue is approximately one block from the other two sites, and on the other side of the street.

13. Elm and Hiawatha are not one property, but two separate residences and addresses. The Hiawatha and Elm Street addresses were treated as two separate locations by the Commission as they are separate addresses with separate applications.

14. The Elm Street and Hiawatha locations are separated by a fence at the back of each property. Petitioner uses a ladder to traverse over the fence between the Elm Street and Hiawatha locations.

15. The area where Petitioner wishes to house Class I wildlife is a residential area with small single-family houses located close together, with small yards, and near a major road.

There are residential properties to the east of both the Hiawatha and Elm Street locations. Petitioner's neighborhood is densely populated, with single-family residential dwellings and small lots. Petitioner's locations are within approximately 100 yards from large intersections at Sligh Avenue and Florida Avenue.

16. The three properties where Petitioner sought to keep Class I wildlife are zoned single-family residential. Approximately six people per week visit through Petitioner's facilities.

17. Petitioner has received various permits, including Class I, from the Commission for over the past 15 years.

18. It is possible to obtain a Class I license and not be qualified to possess animals at the address on the license.

19. Pursuant to law, a permittee for Class I wildlife has to meet specific requirements including standard caging requirements and land area. The land area required to house Class I wildlife is 1/4 acre minimum. An acre of land is 43,560 square feet. One-quarter of an acre is 10,890 square feet. The 1/4 acre minimum area for Class I wildlife is critical because it allows for a larger buffer for dangerous animals.

20. Respondent wildlife inspectors visit applied-for sites to determine whether the facility meets the caging requirements, whether wildlife are housed safely and ensure the public is not at risk.

21. Respondent inspections are made to determine whether caging is strong enough to contain animals safely and to verify the owner or possessor does not exceed the number of permitted animals.

22. Wildlife officers regulate and enforce the caging of captive wildlife, both exotic and native. It is necessary to have cages meet the rules to protect the safety of the animal, the neighbors, and the keeper.

23. Respondent's Lieutenant Stephen Delacure, who has been a Commission Wildlife Officer or Inspector for approximately ten years, has been to Petitioner's three locations in Tampa at least 15 times over the past four years.

24. Delacure has never seen any Class I animals at any of Petitioner's three locations.

25. On November 12, 1998, Delacure and Lieutenant Krause inspected all three of Petitioner's locations pursuant to his application.

26. Delacure inspected the three locations for appropriate caging and land area for bears, leopards, and baboons. Delacure measured all locations with Petitioner present and indicated that he gave Petitioner "the benefit of the doubt" as to the measurements.

27. Delacure measured the total area for 127 West Hiawatha Street to be 103 feet by 39 feet (front and depth) (4,017 square feet). Delacure measured the total area of 116 West Elm Street

to be 87 feet by 69 feet (6,003 square feet). Therefore, Delacure found the combined area for 127 West Hiawatha Street and 116 West Elm to be 10,020 square feet. Delacure measured the total area of 6802 North Highland Avenue to be 102 feet by 42 feet (4,284 square feet).

28. Delacure found no adequate caging for Class I bears, baboons, or cats at 127 West Hiawatha Street. In addition, Delacure found no caging for Class I wildlife at 116 West Elm Street nor 6802 North Highland Avenue.

29. The November 1998 inspection was the basis for the issuance of the amended notice of denial for failure to meet land area requirements and to meet caging requirements. Respondent denied Class I licenses to Petitioner because of inadequate land area and caging.

30. Class II licenses do not say "all" for possession purposes, as these licenses are defined by specific animal families. However, Class III licenses may say "all" for possession purposes.

31. The Respondent changed Class I licenses to animal specific from the "all" designation to ensure that the animal possessor is familiar with the handling of that family or species of animal as nutritional, health, and handling requirements are different for each animal family.

32. Linda Coomey is a building inspector for the City of Tampa, having done this job for 15 years. Coomey inspects zoning and code enforcement.

33. Coomey has been to Petitioner's locations 12-13 times over the last eight years. Coomey calculated the area of 127 West Hiawatha Street as 38 feet by 103 feet (3,914 square feet).

34. Coomey calculated the area of 116 West Elm Street as 65 feet by 80 feet (5,200 square feet). Therefore, Coomey found the combined area of 127 West Hiawatha Street and 116 West Elm Street is 9,114 square feet. The area of 6802 North Highland Avenue was calculated by Coomey as 50 feet by 104 feet (5,200 square feet). These measurements were taken from the Hillsborough County plat maps and Coomey does not consider any error in measuring the square footage as acceptable.

35. The Hillsborough County Property Appraiser's Office found the area of the three properties to be as follows: 127 West Hiawatha Street, 38 feet by 103 feet (3,914 square feet); 116 West Elm Street, 65 feet by 80 feet (5,200 square feet); and 6802 North Highland Avenue, 50 feet by 104 feet (5,200 square feet). None of these individual areas is equal to or greater than 1/4 acre, nor does the combining of the areas of 127 West Hiawatha Street and 116 West Elm Street (3,914 square feet and 5,200 square feet, for a total of 9,114 square feet) meet or exceed 1/4 acre.

36. The Hillsborough County Tax Collector's Office reports 127 West Hiawatha Street as being .09 acres; 116 West Elm Street as being .12 acres; and 6802 North Highland Avenue as being .12 acres. Therefore, the Hillsborough County Tax Collector's Office found the combined area of 127 West Hiawatha Street and 116 West Elm Street is .21 acres.

37. Per Petitioner, 127 West Hiawatha Avenue is 39 feet by 103 feet (4,017 square feet) in total area, and Respondent's officers informed Petitioner he did not have the required acreage.

38. Respondent informed Petitioner on more than one occasion that Petitioner could have a Class I license that allows a person to borrow an animal and not be allowed to posseses Class I animals on the license holder's property.

39. On September 6, 1991, Petitioner was issued a license for 127 West Hiawatha Street, which cited that Petitioner could possess the following: Class I, felidae, cercopithecidae, and ursidae; Class II, felidae and cercopithecidae; Class III, all excluding venomous reptiles.

40. On July 23, 1993, Petitioner was issued a license for 127 West Hiawatha Street, which cited that Petitioner could possess the following: Class I, none; Class II, felidae; Class III, all excluding felidae.

41. On June 29, 1993, Petitioner was issued a license for 116 West Elm Street, which cited that Petitioner could possess the following: Class I, ursidae, cercopithecidae, and felidae.

42. On June 29, 1993, Petitioner was issued a license for 6802 North Highland Avenue, which cited Petitioner could possess the following: Class I, ursidae, felidae, and cercopithecidae; Class II, all excluding venomous reptiles; Class III, all excluding venomous reptiles.

43. On June 29, 1994, Petitioner was issued a license for 116 West Elm Street, which cited Petitioner could possess the following: Class I, felidae, cercopithecidae, and ursidae; Class II, all, excluding venomous reptiles; Class III, all excluding venomous reptiles.

44. On June 29, 1994, Petitioner was a issued a license for 6802 North Highland Avenue, which cited Petitioner could possess the following: Class I, felidae, cercopithecidae, and ursidae; Class II, all, excluding venomous reptiles; Class III, all excluding venomous reptiles.

45. On July 4, 1994, Petitioner was issued a license for 127 West Hiawatha Street, which cited Petitioner could possess the following: Class I, none; Class II, felidae; Class III, all excluding venomous reptiles.

46. On June 27, 1996, Petitioner was issued a license for 127 West Hiawatha Street, which cited Petitioner could possess

the following: Class I, none; Class II, felidae; Class III, all, excluding venomous reptiles.

47. On August 9, 1996, Petitioner was issued a license for 116 West Elm Street, which cited Petitioner could possess the following: Class I, felidae, cercopithecidae, and ursidae; Class II, felidae and cercopithecidae; Class III, all excluding venomous reptiles.

48. On August 9, 1996, Petitioner was issued a license for 6802 North Highland Avenue, which cited Petitioner could possess the following: Class I, felidae, cercopithecidae, and ursidae; Class II, felidae and cercopithecidae; Class III, all excluding venomous reptiles. This was the last instance where Petitioner was licensed to possess Class I wildlife.

49. On September 16, 1997, Petitioner was issued a license for 127 Hiawatha Street, which cited Petitioner could possess: Class I, none; Class II, felidae; Class III, all.

50. On September 16, 1997, Petitioner was issued a license for 116 West Elm Street, which cited Petitioner could possess: Class I, none; Class II, none; Class III, all, excluding venomous reptiles.

51. On September 16, 1997, Petitioner was issued a license for 6802 North Highland Avenue, which cited Petitioner could possess: Class I, none; Class II, none.

52. Lieutenant Dennis Parker is an inspector for Respondent, having worked for Respondent 26 years. Parker has

consistently inspected Petitioner's facilities for more than 15 years. Parker measured 127 West Hiawatha Street "from curb to curb" in 1992 pursuant to Petitioner having a bear on the premises. Petitioner immediately received notice from Respondent that his acreage was inadequate via a "field revocation." Petitioner was ordered to remove the Class I animals.

53. Petitioner was mistakenly provided a Class I license for ursidae before the Commission measured 127 West Hiawatha Street, under Parker's assumption that Petitioner had adequate acreage. A Class I license requires 1/4 acre or more to possess a Class I animal on that property.

54. Petitioner's license for Class I ursidae was based on Petitioner's borrowing a bear for exhibition, with the bear being kept at a licensed facility not owned by Petitioner. Petitioner used 127 West Hiawatha Street as the mailing address for the license. Respondent had never inspected or authorized caging for bears at 127 West Hiawatha Street.

55. Petitioner originally obtained bears without the knowledge and/or consent of Respondent, then a complaint was filed with Respondent. Petitioner recently had an animal escape from the 116 Elm Street location.

56. Petitioner presently possesses Class I animals. Petitioner's properties do not meet the regulatory requirement for acreage size to house Class I wildlife pursuant to Rule 68A-6.022 (formerly 39-6.022), Florida Administrative Code.

57. Petitioner is one of thousands of persons who has authority to possess animals, but does not have an approved facility address to house the animals.

58. Moreover, assuming arguendo that the properties are combined, Petitioner's properties at 127 West Hiawatha and 116 West Elm fail to meet the mandatory requirements for acreage to house Class I wildlife, pursuant to Rule 68A-6.022, Florida Administrative Code.

CONCLUSIONS OF LAW

59. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties pursuant to Section 120.57(1), Florida Statutes, and Chapter 65B-11.013, Florida Administrative Code.

60. Article IV, Section 9, Florida Constitution, creates and grants Respondent "the regulatory and executive power of the state with respect to wild animal life. . . ." Section 372.921(1), Florida Statutes, directs all persons who wish to exhibit or sell wild animals, whether indigenous to Florida or not, to obtain a license from the Commission. Rules 68A-5.004, 6.002, 6.003, 6.004, 6.022, and 6.0023, Florida Administrative Code (formerly found in Title 39, Florida Administrative Code) govern the licensing and housing of wildlife.

61. Petitioner, as applicant for a license to sell or exhibit wildlife, has the burden of demonstrating eligibility for the license. McDonald v. Department of Professional Regulation,

582 So. 2d 660, 670 (Fla. 1st DCA 1991), citing Balino v. Department of Health and Rehabilitation Service, 348 So. 2d. 349, 350 (Fla. 1st DCA 1977).

62. Rule 68A-6.022(5) (formerly Rule 39-6.022), Florida Administrative Code, mandates that an applicant for a license to possess Class I wildlife must possess the Class I wildlife on not less than 1/4 acre.

63. Petitioner applied to possess bears, baboons and leopards, all Class I wildlife pursuant Rule 68A-6.002 (formerly Rule 39-6.002), Florida Administrative Code.

64. Each of Petitioner's properties, 127 West Hiawatha Street, 116 West Elm Street, and 6802 North Highland Avenue, is less than 1/4 acre. This conclusion is supported by the testimony of Lieutenant Parker, Lieutenant Delacure, and Linda Coomey, the exhibits provided through the Hillsborough County Tax Collector's and Property Appraiser's Offices, and the testimony of Petitioner himself.

65. Although estoppel is an application of the rules of fair play and is an appropriate defense in certain matters, it is not merited in the instant case.

66. First, equitable estoppel may not be applied against a governmental entity to accomplish an illegal result. Branca v. City of Miramar, 634 So. 2d 604, 606, (Fla. 1994), citing State Department of Revenue v. Anderson, 403 So. 2d 397 (Fla. 1981). To apply the equitable doctrine against Respondent and allow

Class I animals to be housed at Petitioner's properties would be violative of the administrative law cited above.

67. Additionally, the doctrine of equitable estoppel may be applied against the state only rarely and under exceptional circumstances. Dolphine Outdoor Advertising v. Dept. of Transportation, 582 So. 2d 709, 710 (Fla. 1st DCA 1991), citing North American Co. v. Green, 120. So. 2d 603 (Fla. 1959); Tri-State Systems, Inc. v. Dept. of Transportation, 500 So. 2d 212 (Fla. 1st DCA 1986), rev. den. 506 So. 2d 1041 (Fla. 1987). See also Corona Properties of Florida, Inc. v. Monroe County, 485 So. 2d 1314, 1317, in which the court stated that a governmental entity cannot be estopped from enforcement of its ordinances by an illegally issued permit. Here, Petitioner asserts that an improperly issued license should require the Commission to issue a Class I license in violation of agency rule. The assertion is incorrect.

68. The court in Tri-State enunciated that equitable estoppel shall only be afforded if the facts support the following three elements: (1) representation of a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and 3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. See Tri-State Systems, Inc. v. Dept. of Transportation, 500 So. 2d at 215-216.

69. In Council Brothers, Inc. v. City of Tallahassee, 634 So. 2d 264 (Fla. 1st DCA 1994), the court reiterated the above three criteria which the asserting party must demonstrate to establish a basis for estoppel, but also held that for one to successfully invoke equitable estoppel against the government, the party must also demonstrate the existence of affirmative conduct on the part of the government which goes beyond mere negligence. See Council Brothers, Inc. v. City of Tallahassee, 634 So. 2d at 266. Here, there has been no demonstration by Petitioner of affirmative conduct by Respondent beyond mere negligence.

70. The Council Brothers, Inc. court also held that the governmental conduct must cause serious injustice for equitable estoppel to be applicable. See Council Brothers, Inc. v. City of Tallahassee, 634 So. 2d at 266. As Petitioner has continued to exhibit Class I wildlife throughout the 1990's, no serious injustice has been demonstrated. Lastly, and equally important, this court held that any application of estoppel against the government must not unduly harm the public interest. See also Alachua County v. Cheshire, 603 So. 2d 1334, 1337 (Fla. 1st DCA 1992). Here, Petitioner seeks to house the most dangerous animals regulated by Respondent. The neighborhood in which Petitioner wishes to house Class I wildlife is of a high density and residential, and close to major roads. The use of equitable estoppel under these circumstances would unduly harm the public

interest by allowing bears, leopards, and baboons into this environment.

RECOMMENDATION

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

RECOMMENDED that the Florida Fish and Wildlife Conservation Commission enter a final order upholding the Commission's Amended Notice of Denial.

DONE AND ENTERED this 18th day of February, 2000, in Tallahassee, Leon County, Florida.

WILLIAM R. PFEIFFER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.