STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHIRLEY A. REYNOLDS, AND DIANN P. BOWMAN, Petitioners,	)	
vs.	)	Case No. 03-4478RU
BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND AND FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Stephen F. Dean, held a formal hearing in the above-styled case on January 5, 2004, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Ross Stafford Burnaman, Esquire
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Tallahassee Florida 32301

For Respondent: Suzanne B. Brantley, Esquire
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Department of Environmental Protection
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STATEMENT OF THE ISSUES

Does a statement by an agency that its regulatory authority is limited by Section 161.58, Florida Statute, constitute a non-rule policy?

Does a statement by an agency that fees levied under authority of Section 161.58, Florida Statutes, by county governments for beach driving do not constitute revenue for purposes of invoking its regulatory jurisdiction pursuant to Florida Administrative Code Rule 18-21.005 (Rule 18-21.005) constitute a non-rule policy?

PRELIMINARY STATEMENT

In their Petition, filed on November 26, 2003, Petitioners allege that the e-mail of Ken Reecy, an employee of the Department of Environmental Protection (Department), to Ross Burnaman, made September 4, 2003, is a policy statement that is required to be adopted as a rule under Section 120.54, Florida Statutes, and that they are substantially affected by the statement. They allege that the statement made by Reecy related to matters within the regulatory authority of the Board of Trustees of the Internal Improvement Trust Fund (BOT). Petitioners also request attorney's fees and costs if they prevail.

Respondents maintain that Petitioners are not substantially affected by the statement; and that it is not a rule even if

they were affected. Further, Respondents state that rulemaking would not be practicable. Additionally, the Department made a Motion to Drop Department as Party that was not ruled upon at hearing. It is denied for reasons stated in the Conclusions of Law.

At the hearing, Petitioners called four witnesses: Diann Phelps Bowman, David Arnold, Shirley Reynolds, and Ken Reecy. Joint Exhibits 1 and 2 were admitted. Petitioners' Exhibits 5, 6, 7, 8, 9, and 16 were admitted; and Petitioners' Exhibits 10 and 12 were accepted as proffers, but excluded from evidence. Respondents called two witnesses: Ken Reecy and James W. Stoutamire. Respondents' Exhibits 1, 3, and 4 were admitted into evidence.

A two-volume transcript was filed on January 20, 2004. Each party filed a Proposed Final Order that was considered in preparing this Final Order.

FINDINGS OF FACT

Petitioners

1. Petitioner Shirley Reynolds (Reynolds) resides and owns beachfront property overlooking the Atlantic Ocean in New Smyrna Beach, Volusia County, Florida. Reynolds does not own to the mean high water line, and her property is not adjacent to the sovereign submerged lands held by the Trustees. Reynolds “shares riparian rights with the public.”

2. Reynolds has owned her oceanfront home since 1981. She has observed beach driving by the general public on the beach and in the shallow water in the vicinity of her home. She enjoys the beachfront for “regular recreational, traditional recreational purposes.”

3. Petitioner Diann Bowman (Bowman) resides and owns property that extends to and adjoins the mean high water line of the Atlantic Ocean in New Smyrna Beach, Volusia County, Florida. Bowman has observed the general public driving on the beach and in shallow waters of the Atlantic Ocean in the vicinity of her property. Bowman goes swimming in the ocean, builds sand castles by the edge of the water with her grandchildren, and walks on the beach with friends.

4. Petitioners did not have any requests for leases or applications for action pending before the BOT, and Volusia County had not made an application to the Trustees for any activity permit or lease.

5. Petitioner Bowman was not even aware of Reecy's e-mail, and could not articulate how she was affected by it.

6. Although Reynolds testified at length about the impacts of beach driving and beach concessions between her home and the ocean, she failed to show how she was affected by Reecy's statements that the BOT does not regulate beach driving. In response to counsel’s question of what personal interest she has

in whether or not the Trustees require authorization to use state land for motor vehicle traffic in front of her home, she responded, “[I]f and when they ever deal with it, it will certainly raise the consciousness of the human safety element.”

7. Petitioners testified regarding the adverse impacts of beach driving on their property and their enjoyment of their property. Beach driving has an adverse impact upon the property values and upon their enjoyment of their property.

Respondents

8. The BOT is an agency of the State of Florida, consisting of the Governor and Cabinet. (Art. IV, s. 4 (f), Fla. Const.) The BOT holds the title to the State’s sovereign submerged lands acquired at statehood “for the use and benefit of the people of the state,” pursuant to Chapter 253, Florida Statutes. (§§ 253.001, 253.03, and 253.12, Fla. Stat.) Private use of such lands generally requires consent of the BOT and must not be contrary to the public interest.

9. The BOT is required to manage and conserve state-owned lands, including sovereignty lands, by law and is granted rulemaking authority to that end.

10. The Department functions as the staff for the BOT, and issues leases and other authorizations for private parties to use sovereign submerged lands under Chapter 253, Florida Statutes, and Chapter 18-21, Florida Administrative Code.

11. In carrying out its duties with relationship to the BOT, the Department implements policy as determined by the BOT, to include taking some final agency actions. The Department would be the agency through which the BOT would initiate rulemaking. The Department does not have delegated authority to adopt rules for the BOT.

12. Ken Reecy (Reecy) is a Senior Management Analyst Supervisor in the Department's Division of State Lands. One of Reecy's job duties is to provide responses to requests for BOT's public records housed in the Division of State Lands of the Department.

13. On August 5, 2003, Ross Burnaman e-mailed Eva Armstrong of the Department the following public records request:

> Hi Eva-I am hoping that you can assist me with this inquiry for public records. I'm looking for any Trustees authorization for the use of state lands (including uplands and submerged lands) for beach driving by the general public or commercial vendors. While I'm aware of Section 161.58, Florida Statutes, I'm of the opinion that Trustees' authorization is still required for beach driving on state lands. Most local governments that allow beach driving (e.g. Gulf County, Volusia County) charge a fee for that activity. That would appear to trigger, Rule 18-21.005(b)(2), FAC, and the requirement for a lease. As I understand it, public beach driving is allowed in parts of the following counties: Nassau, Duval,

> Flagler, St. Johns, Volusia, Gulf and Walton counties. Thanks in advance for you assistance. Best regards, Ross Burnaman (phone number deleted)

14. Ms. Armstrong passed this request to Ken Reecy of the Department who replied to Mr. Burnaman with the following e-mail message:

> Mr. Burnaman
>
> Concerning your request as to any authorization by the Board of Trustees for beach driving and fees triggering Rule 18-21.005(b)(2)[sic]:
>
> We are unaware of any instance in which the issue of beach driving has been brought before the Board of Trustees for authorization. Further, in discussions with staff from our legal department, it is felt that s. 161.58 sufficiently covers the issue and that authorization from the Board is not necessary. We are also of the opinion that fees counties charge for beach driving would not trigger Rule 18-21.005(b)(2)[sic]. If you have any further questions on this issue, please contact Suzanne Brantley in EIP's Office of General Counsel (phone number deleted)

15. The e-mail above contains two potential policy statements; one concerning a statute and the other concerning a rule. The analysis of each differs slightly.

16. The BOT was authorized at one time to regulate all the uses of state sovereignty lands, to include regulation of driving on the state's beaches, i.e., that portion of land seaward of the mean high water line (hereafter: beach.)

17. The BOT restricted the operation of private vehicles on the beaches via rule.

18. The Legislature of the State of Florida enacted Section 161.58, Florida Statutes, which authorized those counties which had traditionally permitted driving on the beach to regulate the operation of privately owned vehicles on the beaches in their counties.

19. Several of the counties which had traditionally permitted driving on the beach permitted privately owned vehicles to be operated on the beach in their counties and charged a small fee to defray the costs of providing parking, life guards, and traffic direction on the beaches.

20. The BOT attempted to intervene in those counties which charged fees for beach driving on the basis that the fees being charged were "revenue" producing.

21. The Legislature of the State of Florida amended Section 161.58, Florida Statutes, to specifically authorize the counties to collect reasonable fees to defray their costs of regulating beach driving.

22. The statements that are challenged have not been adopted as a rule.

23. Reecy testified at the hearing. Reecy only intended to give Burnaman information related to his public records request. The portion of Reecy's e-mail that is being challenged

was intended to explain why no records were found. Reecy responded because Burnaman had sent follow-up e-mails to Reecy's supervisor, Armstrong, the Director of the Division of State Lands. Reecy knew that Armstrong had a practice of providing information to the public when it was requested.

24. Reecy is not charged with implementing or interpreting Florida Administrative Code Rule 18-21 and does not process applications for leases or other authorizations from the BOT.

25. Reecy's statement that no records were found is not a policy statement and has not been alleged to be one by Petitioners.

26. Reecy conferred with Department legal staff before issuing his statement about Section 161.58, Florida Statutes. Reecy did not state that Section 161.58 exempted counties from getting BOT authorization for beach driving, as Petitioners state in their Petition, for several reasons: first, Reecy is not the person on the BOT's staff who makes such determinations; second, there was no factual determination pending, i.e., no request for declaratory statement or request for an exemption or authorization; and third, the statute cited and its history indicate that the Legislature has vested the exclusive authority to regulate beach driving in those counties in which it traditionally occurred to county government in those counties.

27. James W. Stoutamire (Stoutamire) is the principal Department employee who is charged with interpreting and applying the BOT's rules. Stoutamire was the person to whom authority had been delegated to make such policy determinations. Burnaman's request was not presented to Stoutamire, and Reecy did not consult with Stoutamire.

28. Although it is a statement concerning general law, Reecy's first statement regarding Section 161.58, Florida Statutes, does not assert agency jurisdiction or exempt a specific factual predicate from agency jurisdiction.

29. Reecy also discussed Burnaman's reference to Florida Administrative Code Rule 18-21.005(1)(b)2. with the Department's legal staff. Reecy's references to the section mistakenly cites it as Rule 18-21.005(b)2. Regardless of Reecy's intent, his answer constitutes an interpretation of the rule as applied to the fees charged by counties for beach driving.

30. The BOT's rules provide what types of private activities must have consent prior to their being undertaken on sovereign submerged lands. They do not contain a list of all of the many public activities that occur on Florida's beaches, shores, and waters that do not require consent.

31. The BOT's rules in Chapter 18-21 are not intended to prevent air or noise pollution, promote public safety, protect property values, provide peace and quiet, or protect quality of

life. These are the concerns about which Petitioners testified as diminishing their peaceful enjoyment of their property rights.

32. Beach concessions above the mean high water line do not fall within the Trustees jurisdiction or control.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter under Sections 120.56 and 120.57(1), Florida Statutes.

34. The Department moved to be dismissed as a party in this cause. Based upon the facts adduced at hearing, the employees of the Department have authority to implement BOT policies and to apply the Board's authority to specific factual circumstances. Based upon the foregoing, the motion is denied.

35. As is generally the case, Petitioners have the burden to go forward and the burden of proof in this case.

36. The BOT holds title to and manages state-owned lands, including all sovereign submerged lands, under Chapter 253, Florida Statutes. See §§ 253.001, 253.03, Fla. Stat. Sovereignty submerged lands are defined generally as those lands seaward of the mean high water line.

37. The BOT generally requires consent for private use of sovereign submerged lands. § 253.77, Fla. Stat. Private

activities on sovereign submerged lands must not be contrary to the public interest. Art. X, s. 11, Florida Constitution.

38. As stated above there are two separate issues in this case, as follows:

> Does a statement by an agency that its regulatory authority is limited by Section 161.58, Florida Statute, constitute a non-rule policy?
>
> Does a statement by an agency that fees levied under authority of Section 161.58, Florida Statutes by county governments for beach driving do not constitute revenue for purposes of invoking its regulatory jurisdiction pursuant to Florida Administrative Code Rule 18-21.005 (Rule 18-21.005) constitute a non-rule policy?

Standing

39. The first issue in this type of case is the standing of Petitioners to bring the challenge. Section 120.56(4)(a), Florida Statutes, provides that "[a]ny person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)."

40. In order to meet the "substantially affected" test under Section 120.56, Florida Statutes, Petitioners must establish: (1) a real and sufficiently immediate injury in fact; and (2) that the alleged interest is arguably within the zone of interest to be protected or regulated. Lanoue v. Florida Dept. of Law Enforcement, 751 So. 2d 94, 96 (Fla. 1st DCA 1999).

41. Petitioners lack standing to challenge the first statement because they are not within the zone of interest of the purported rule. The challenged statement is a negation of authority to regulate, not an assertion of authority. Further, it is not made with regard to a particular application or in regard to a declaratory statement. Petitioners are not in the zone of interest of this statement.

42. An agency statement is a rule if it (1) "purports in and of itself to create certain rights and adversely affect others" or (2) serves "by (its) own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." State Dept. of Administration, Division of Personnel v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977); Department of Revenue of State of Fla. v. Vanjaria Enterprises, Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996). The challenged statement does not meet either of the aforementioned criteria as a statement of lack of jurisdiction.

43. Petitioners must show that the Trustees' statement that authorization by the Trustees for beach driving not being required, and not the beach driving itself, substantially affects them. This is difficult to do because the statement implicitly recognizes that county governments in the counties where beach driving is permitted are the regulatory authority. While it is obvious that Petitioners do not like the way their

county regulates beach driving, they have not shown how lack of regulation by the BOT adversely affects them. Such a showing is necessary. See Kruer v. Board of Trustees of Int. Imp. Trust Fund, 647 So. 2d 129, 132 (Fla. 1st DCA 1994), and Grove Isle, Ltd. v. Bayshore Homeowners' Assn., 418 So. 2d 1046 (Fla. 1st DCA 1982).

44. Lastly, regarding the first statement challenged, the history surrounding driving on the beach and regulation by the BOT indicates that the Legislature has limited BOT's jurisdiction to regulate driving on the beach by Section 161.58, Florida Statutes. The challenged statement is re-statement of the scheme of statutory regulation, and not a statement of BOT policy. See Lanoue v. Florida Department of Law Enforcement, (1st DCA 1999), 751 So. 2d 94, regarding the challenge to non-rule policies, "They are simply too remote and lack the direct impact present with the challenged existing rules." Petitioners fail to show how they are adversely impacted by the absence of BOT regulation, as opposed to county regulation.

45. Regarding the second challenged statement, again the first thing to consider is Petitioners' standing to challenge this statement. The court found in Town of Palm Beach v. State Department of Natural Resources, 577 So. 2d 1383, (4th DCA 1991), that the BOT’s interpretation of its rules in determining that it did not have jurisdiction created standing for adjoining

property owners to challenge the agency's decision. In this case, Mr. Reecy stated that the BOT did not consider the user fees collected for beach driving as revenue generating/income related activities for purposes of asserting regulatory jurisdiction pursuant to Florida Administrative Code Rule 18-21.004, et seq.

46. This determination is sufficient to place Petitioners who own property adjoining or in proximity to the state's sovereignty land within the zone of interest if they can show that the decision substantially effects them. Unfortunately, Petitioners fail to make this showing for several reasons.

47. Their "injury" comes from the manner in which the county is regulating the activity and the nature of the "injury" does not fall within those interests that are in the regulatory jurisdiction of the BOT.

48. As stated above with regard to the first statement, Petitioners must show that the Trustees' statement that the fees collected for beach driving do not trigger BOT jurisdiction substantially affects them, and not the beach driving itself. See Kruer v. Board of Trustees of Int. Imp. Trust Fund, 647 So. 2d 129, 132 (Fla. 1st DCA 1994), and Grove Isle, Ltd. v. Bayshore Homeowners' Assn., 418 So. 2d 1046 (Fla. 1st DCA 1982).

49. Again the second challenged statement is based upon legislative history, and a clear intent that the BOT not

regulate this area through fees. Adopting as a rule the statement that the Trustees do not regulate beach driving would not change the fact that beach driving occurs and is regulated by the counties. Petitioners desire that the Trustees require a lease does not show how they are injured by the lack of BOT jurisdiction.

50. The Trustees' historic practice and position in litigation show that the BOT have treated beach driving as a traditional public use rather than a private use. (See City of Daytona Beach Shores v. State of Florida, 483 So. 2d 405 (Fla. 1985); City of New Smyrna Beach v. Board of Trustees of the Int. Imp. Trust Fund, 543 So. 2d 824 (Fla. 5th DCA 1989). Public activities are subject to Trustees rules in Chapter 18-21 only if they involve alteration of the sovereign lands or preemption of traditional public activities.

51. The Trustees' current and historic position is that a lease or other form of consent is not required under section 18-21.004 for beach driving. The Trustees do not consider a "revenue generating/income related activity" under its rules.

52. While Petitioners have alleged that the beach driving adversely affects public safety and related issues, the issue of BOT jurisdiction based upon alteration of the public land or preemption of public uses is not involved in the challenged statements. It goes without saying that the challenged

statement must relate to the alleged injury suffered. The statement that fees for beach driving do not trigger BOT regulation does not address or relate to an alleged impact upon a traditional public activity. Conversely, the statement about the fees in no way restricts the BOT from asserting jurisdiction via its powers to regulate impacts upon traditional public activities. However, Petitioners are limited to issues arising from fees to regulate beach driving. To satisfy the sufficiently real and immediate injury in fact element, the injury must not be based on pure speculation or conjecture. Ward v. Board of Trustees of the Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995).

53. It is a long-standing rule of statutory construction that more specific statutes take precedence over statutes of general application. In interpreting its jurisdiction, the BOT has recognized the legislative intent to grant the counties where beach driving is traditional the authority to regulate beach driving and charge user fees to regulate beach driving. The passage of the provision specifically permitting counties to collect user fees, thereby frustrating BOT's previous attempt to regulate fees for beach driving, is clear evidence of the Legislature's intent to grant primary authority to these counties to regulate beach driving.

54. The Legislative history shows an intent to carve out an exception to the BOT's jurisdiction with regard to beach driving and with regard to the fees on beach driving. While this specific statute takes precedence over more general jurisdictional statements, it is also limited by its explicitness. Where beach driving, for example, does interfere with other traditional uses, the BOT has jurisdiction to adopt such rules as it sees fit to harmonize those uses so that all members of the public can enjoy their heritage.

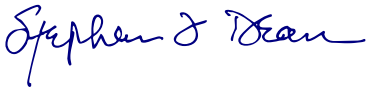
ORDER

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

ORDERED:

The Petition is denied.

DONE AND ORDERED this 20th day of February, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.