

**STATE OF FLORIDA
FISH AND WILDLIFE CONSERVATION COMMISSION**

**COLLIER COUNTY BOARD OF COUNTY
COMMISSIONERS, ET. AL.,**

Petitioners,

vs.

Case Nos.

05-2034

05-2035

**FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION, ET
AL.,**

05-2036

05-2037

Respondents,

**CITIZENS TO PRESERVE NAPLES BAY
INC., AND THE CONSERVANCY OF
SOUTHWEST FLORIDA, INC.,**

Intervenors.

FINAL ORDER

This case involves an application by the City of Naples for a permit to place regulatory markers on waters in and around Naples Bay.

On December 22, 2006, The Honorable P. Michael Ruff, an Administrative Law Judge with the Division of Administrative Hearings (hereinafter "DOAH") submitted his Recommended Order to the Florida Fish and Wildlife Conservation Commission, (hereinafter "FWC"). Copies of the Recommended Order were also served upon the Petitioners, the Intervenors, and upon the Co-Respondent City of Naples (hereinafter "the City"). A copy of the Recommended Order is attached as Exhibit A.

On January 8, 2007, Exceptions to Recommended Order were filed with FWC on behalf of Co-Respondent. On January 17, 2007, a Response to the Co-Respondent's Exceptions to

Recommended Order was filed on behalf of the Petitioners. The matter is now before the agency for final action.

THE ISSUE

Does FWC have the authority and, if so, the duty to prevent an ordinance adopted pursuant to Section 327.60, Florida Statutes, from taking effect by denying the issuance of a waterway marker permit until it has reviewed the available accident, citation, and vessel traffic information, as well as other available, relevant, and reliable information, and has made its own independent determination that the data supports the imposition of the ordinance's restrictions?

BACKGROUND

On November 17, 2004, the City of Naples adopted Ordinance Number 04-10664, regulating the operation of vessels upon certain waters within the city's jurisdiction. On December 22, 2004, the City submitted its application for a permit to place the regulatory markers necessary for the ordinance to take effect. On May 5, 2005, following four months of review of the application and investigation into the proposed appearance, construction, and locations for the markers, FWC issued its Notice of Intent to issue the requested permit. FWC verified that the City had considered accident reports, uniform boating citations, vessel traffic studies, or other creditable data in adopting the ordinance, but did not independently reevaluate that information to form its own conclusions as to the wisdom of or necessity for the ordinance.

Petitioners ask FWC to prevent the ordinance from taking effect by denying the permit necessary for the placement of regulatory markers. They assert that FWC has the authority to look behind the four corners of the ordinance to independently ascertain the necessity for additional speed restrictions and, if it disagrees with the applicant, a duty to substitute its

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Petitioners ask FWC to prevent the ordinance from taking effect by denying the permit necessary for the placement of regulatory markers. They assert that FWC has the authority to look behind the four corners of the ordinance to independently ascertain the necessity for additional speed restrictions and, if it disagrees with the applicant, a duty to substitute its

judgment for that of the duly elected legislative body that enacted the ordinance and deny the requested permit. Petitioners also assert that FWC has both the authority and the duty to look behind the four corners of the application to independently ascertain the applicant's true "purpose for placing the proposed markers" and to deny the permit if FWC does not believe that the purpose is truly for safety or navigation.

**FWC'S AUTHORITY TO ADOPT, MODIFY OR REJECT
AN ALJ'S RECOMMENDED ORDER**

Pursuant to Section 120.57(2)(f), Florida Statutes, FWC has the authority to reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction.

The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Section 120.57(2)(f), Florida Statutes.

In Barfield v. Dep't of Health, Bd. of Dentistry, 805 So. 2d 1008 (Fla. 1st DCA 2001), the First District Court examined in detail the legislative history of the provisions of Section 120.57(1)(f), Florida Statutes and substantive jurisdiction. In that case, an applicant for dental licensure appealed the final order of the Department of Health, Board of Dentistry (the Board),

for its rejection of the ALJ's Recommended Order, denying his application on the ground that he had failed the clinical portion of the Florida Dental License Examination. The ALJ had ruled that certain grading sheets, which the Board had relied on in deciding that Barfield had failed the examination, were inadmissible hearsay and could not be used as evidence to show that Barfield failed the licensure examination. The Board issued its final order rejecting the ALJ's conclusion of law. The applicant argued, and the First District Court agreed, that the Board, as the reviewing agency of the ALJ's recommended order, had no substantive jurisdiction under Section 120.57(1)(f), Florida Statutes, to displace the ALJ's conclusion of law. However, here, FWC has substantive jurisdiction over waterway markers. The First District Court does not dispute an agency's authority to reject an ALJ's recommended order the agency has substantive jurisdiction over the subject. Furthermore, the First District Court found that an administrative agency would only violate its authority regarding judicial review if an ALJ's conclusions of law are beyond an agency's substantive jurisdiction. (Id. at 1013).

In G.E.L. Corp. v. Dep't of Env'tl. Prot., 875 So. 2d 1257, 1265 (Fla. 5th DCA 2004), the Fifth District Court concluded the Legislature clearly intended to restrict agency review of legal conclusions in a recommended order to those that concern matters within the agency's field of expertise. (Id. at 1264). Here, even Petitioners make ample arguments that permitting markers is within FWC's field of expertise.

Pursuant to Barfield, G.E.L. and the plain language of Section 120.57(2)(f), Florida Statutes, FWC has the authority to reject the ALJ's conclusions of law as to FWC's authority over the permitting of waterway markers because this subject is within FWC's substantive jurisdiction. FWC does reject the ALJ's conclusions of law other than the issue of standing and it states with particularity the reasons for rejection below.

RULINGS ON ALJ'S RECOMMENDED ORDER

ALJ's Recommended Findings of Fact

FWC adopts all of the ALJ's findings of fact found in Paragraphs 1 through 83, to the extent that they are relevant and material.

ALJ's Recommended Conclusions of Law

The FWC adopts the recommended conclusions of law found in Paragraphs 84 through 90 that the parties have standing to challenge the issuance of a permit for regulatory markers. This standing however, is limited to issues pertaining to whether the regulatory markers' appearance, construction and proposed placement would conform to the requirement of the rule. Walburn v. Department of Natural Resources, 14 FALR 3038, 3039-3040, app. dismiss., 589 So. 2d 1332 (Fla.2d DCA 1991). See, Fla. Admin. Code R. 68D-23.104(3). Petitioners also have standing to contest whether or not there exists one of the conflicts enumerated in Florida Administrative Code Rule 68D-23.101(4). Finally, Petitioners have standing to contest whether the City has stated a valid vessel traffic safety or public safety purpose for placing the markers. See, Fla. Admin. Code R. 68D-23.105(1).

FWC rejects the recommended conclusions of law found in Paragraphs 84 through 90 to the extent that these paragraphs conclude that the parties have standing to contest in this proceeding the necessity of the ordinance underlying the waterway marker application. See, Walburn v. Department of Natural Resources, supra.

FWC rejects all of the ALJ's remaining recommended conclusions of law as irrelevant. FWC is not obligated nor authorized to make actual determinations as to whether it can independently determine whether a municipal ordinance speed zone is needed. FWC may only review and approve ordinances that have

been adopted for purposes of manatee protection. Section 370.12(2)(p), Florida Statutes.

The goal of Section 327.41, Florida Statutes, is uniformity of the waterway regulatory markers. Pursuant to Section 327.41 (1), Florida Statutes, "the Commission shall adopt rules pursuant to Chapter 120 establishing a uniform system of regulatory markers for the waters of the state, compatible with the system of regulatory markers prescribed by the United States Coast Guard in the United States Aids to Navigation System, 33 C.F.R."

FWC is not authorized by Section 327.40, Florida Statutes, to preempt local government authority to regulate or establish restrictions for the operation of vessels. FWC's authority is to regulate the marking of waterways for safety or navigational purposes upon application of persons or entities as provided by law. FWC is required to "make such investigations as needed, and issue a permit" Section 327.40(2)(a), Florida Statutes. This sentence means that FWC must investigate to make sure the placement of markers are not a hazard to navigation. Pursuant to Section 327.40, Florida Statutes, the regulatory marker applicant was required to submit a statement describing the purpose of marking. This requirement was satisfied. Nowhere in the statute is FWC authorized to second guess a local government's authority as to whether a boating safety ordinance is needed.

Contrast Section 327.40, Florida Statutes with Section 370.12(2)(p), Florida Statutes, which requires that FWC review and approve the language or ordinances of local governments regulating operation of motorboats addressing the protection of manatees. If Legislature had intended to impose a mandatory review and approval of local ordinances by FWC as to whether boating safety restrictions are needed or not, then it would have provided similar language to that found in Section 370.12(2)(p), Florida Statutes.

While FWC does not believe it has authority to override the City's ordinance as to whether boating safety restrictions are needed in Naples Bay, the issuance of a waterway marker permit in this case does not mean FWC agrees with the City's decision. FWC promotes safe boating and boating safety education. Boating restrictions should be imposed only when necessary and warranted without undue burdens on boaters.

FWC'S SUBSTITUTED CONCLUSION OF LAW AND INTERPRETATION OF THE ADMINISTRATIVE RULES IS AS OR MORE REASONABLE THAN THAT WHICH WAS REJECTED OR MODIFIED

FWC finds that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

This analysis reflects FWC's interpretation and is entitled to great deference. AmeriSteel Corp. v. Clark, 691 So. 2d 473, 477 (Fla. 1997). FWC's view is not contrary to the statute's plain and ordinary meaning. See PAC for Equality v. Department of State, Florida Elections Com., 542 So. 2d 459, 460 (Fla. 2d DCA 1989). See also Florida Department of Education v. Cooper, Case No. 1D-4040, 2003 WL 22508245 (Fla. 1st DCA No. 6, 2003). FWC's interpretation should not be overturned unless clearly erroneous. See e.g., Falk v. Beard, 614 So.2d 1086, 1089 (Fla. 1993); Florida Department of Environmental Regulation v. Goldring, 477 So.2d 532, 534 (Fla. 1985); Harloff v. City of Sarasota, 575 So.2d 1324, 1327 (Fla. 2d DCA 1991); Reedy Creek Improvement Dist. V. Department of Environmental Regulation, 486 So.2d 642, 648 (Fla. 1st DCA 1986).

In Lee County v. Lippi, 662 So.2d 1304 (Fla.2d DCA1995), the District Court of Appeal, Second District agrees with FWC's interpretation of its authority under Section 327.40, Florida Statutes. The court in Lippi expressly ruled that there is no language in Chapter 327, evidencing a legislative intent for state preemption of local government authority over waterways. The court

in Lippi also correctly noted that the sphere of authority for both state and local governments in regulating the operation of most vessels on state waters is embodied in the statutory language of Sections, 327.22, 327.60 and 327.73(1)(i)2, Florida Statutes. Id. at 1306.

Likewise, in Ventura v. Department of Environmental Protection, DOAH Case No. 93-5964, the Division of Administrative Hearings held that if the Legislature had intended that mandatory state review and approval of local ordinances relating to boating safety then presumably, it would have inserted similar language to the provisions of Section 370.12(2)(p), Florida Statutes. There have been no material changes in Chapter 327 since the Lippi and Ventura decisions which alters the validity of these case decisions to the case at hand.

FWC's interpretation of rule 68D-23.105(1)(b) is as reasonable as or more reasonable than that expressed in the recommended order because the interpretation in the recommended order would result in the rule enlarging or modifying the specific provisions of law implemented. See Section 120.52(8)(c), Florida Statutes. (defining "Invalid exercise of delegated legislative authority"). An applicant must provide with its application "a statement of the purpose of marking" the area. Section 327.40(2)(a), Florida Statutes. FWC interprets its own rule 68D-23.105(1)(b)6 to require that a municipality rely on "accident reports, uniform boating citations, vessel traffic studies, or other creditable data" in determining that purpose and that the municipality find, based on these factors, that there is "a significant risk of collision or a significant threat to public safety." These factors are material to the municipality's purpose for regulating the area. They do not, however, give rise to any authority for FWC to substitute its judgment for that of the elected legislative body of the municipality in determining whether or not there is a need for the ordinance itself. Any interpretation of the rule that would require FWC to assume such authority would be unreasonable because it would cause the rule to be

invalid. See State, Bd. of Trustees v. Day Cruise Ass'n, Inc., 794 So.2d 696, 701 (Fla. 1st DCS 2001).

FWC'S CONCLUSIONS OF LAW

1. FWC concludes as a matter of law that no allegations have been made nor any evidence entered that the proposed markers do not conform to the United States Aids to Navigation System and Chapter 68D-23, Florida Administrative Code, as required for determination by FWC pursuant to Rule 68D-23.104 (3)(a)1.

2. FWC concludes as a matter of law that no allegations have been made nor any evidence entered that the proposed markers and any support structures or moorings do not conform to the United States Coast Guard Aids to Navigation – Technical Manual (Comdtinst M16500.3A) as required for determination by FWC pursuant to Florida Administrative Code Rule 68D-23.104 (3)(a)2.

3. FWC concludes as a matter of law that no allegations have been made nor any evidence entered that any conflicts exist with the provisions of Chapter 327, or any amendments thereto or regulations thereunder, for ordinances adopted pursuant to Section 327.60, Florida Statutes, as required for determination by FWC pursuant to Florida Administrative Code Rule 68D-23.104 (3)(a)1.

4. FWC concludes as a matter of law that the City of Naples has stated a valid purpose for marking this area in that it considered and relied on accident reports, uniform boating citations, vessel traffic studies, or other creditable data in determining its purpose for marking and has found, based on these factors, that there is a significant risk of collision or a significant threat to public safety. See Fla. Admin. Code R. 68D-23.105(1)(b)6.

RULING ON RESPONDENT CITY OF NAPLES' AND INTERVENORS' EXCEPTIONS

FWC adopts exceptions 2 and 3.

FWC rejects exceptions 1 and 4 through 12 as moot.

WHEREFORE,**IT IS HEREBY ORDERED:**

1. FWC adopts all of the ALJ's findings of fact found in Paragraphs 1 through 83 to the extent that they are relevant and material.

2. FWC adopts the ALJ's recommended conclusions of law found in Paragraphs 83 through 90 to the extent that the parties have standing to challenge the issuance of a permit for regulatory markers but cannot challenge in this proceeding the need for the ordinance noticed on the markers.

3. Exceptions 2 and 3 are adopted and incorporated herein as Exhibit B.

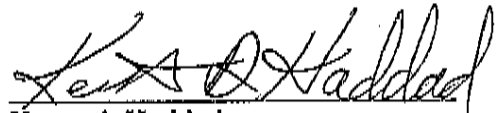
4. Exceptions 1 and 4 through 12 are rejected as moot.

5. The waterway marker permit relating to the City of Naples Application and City of Naples Ordinance 04-10664 is **granted**. The permit is effective 30 days from the date of this order unless a notice of appeal of this order is timely filed.

Any party to this order has the right to seek judicial review of the order under section 120.68 of the Florida Statutes by the filing of a notice of appeal under Florida Rules of Appellate Procedure 9.110 with the Clerk of the Commission in the Office of General Counsel, 620 South Meridian Street, Farris Bryant Building, Tallahassee, Florida 32399-1600, and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The notice of appeal must be filed within 30 days from the date this order is filed with the Clerk of the Commission.

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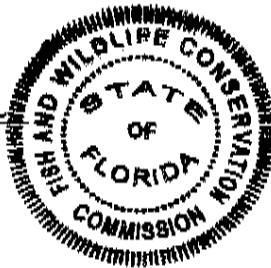
DONE AND ORDERED in Tallahassee, Leon County, Florida, this 21st day of March, 2007.



Kenneth Haddad
Executive Director
Florida Fish and Wildlife
Conservation Commission

Filed with the Agency Clerk
This 21st day of March, 2007


ATTEST: 
Agency Clerk



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above FINAL ORDER and foregoing has been furnished by United States mail to the parties listed below, this 21 day of March, 2007.

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION



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