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STATE OF FLORIDA
FISH AND WILDLIFE CONSERVATION COMMISSION

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

DIVISION OF
ADMINISTRATIVE
HEARINGS

vs.

Case Nos. **05-2034**
 05-2035
 05-2036
 05-2037

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

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

_____ /

REVISED 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 the City and Intervenors. A copy of the Exceptions to Recommended Order is attached as Exhibit B. On January 17, 2007, a Response to the Co-Respondent's Exceptions to Recommended Order was filed on behalf of the Petitioners.

On March 21, 2007, FWC entered a final order, adopting all of the Administrative Law Judge's findings of facts found in Paragraphs 1 through 83, to the extent that they were relevant and material. FWC adopted the recommended conclusions of law found in Paragraphs 84 through 90, that the parties had standing to challenge the issuance of a permit for regulatory markers, limiting this standing to: a) issues pertaining to whether the regulatory markers' appearance, construction and proposed placement would conform to the requirement of the rule; b) issues of whether or not there exists conflicts enumerated in rule 68D-23.101(4) Florida Administrative Code; and c) challenges to 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 rejected all of the Administrative Law Judge's remaining recommended conclusions of law found in Paragraphs 84 through 90 to the extent that these paragraphs concluded that the parties have standing to contest, in this proceeding, the necessity of the ordinance underlying the waterway marker application. FWC also rejected all of the Administrative Law Judge's remaining recommended conclusions of law as irrelevant. Petitioners appealed.

On September 12, 2008, The Second District Court of Appeals set aside the agency's order and remanded the case for further proceedings consistent with the court's order. See, *Collier County Bd. of County Comm'rs v. FWC*, --- So. 2d ---, 33 Fla. L. Weekly D2181 (Fla. 2d DCA 2008), a copy of which is attached as Exhibit C. The matter is now before the agency for final action.

THE ISSUE

The Second District Court of Appeals has determined that FWC has the authority and the obligation to consider the City's permit application and make its own independent analysis and determination as to whether the permit application meets one of the six factual circumstances or criteria required to obtain a waterway safety marker permit under rule 68D-23.105(1)(b), Florida

Administrative Code. At issue in this case is whether areas of Naples Bay are congested, subject to hazardous water levels or currents, or otherwise posed a significant risk of collision or a significant threat to public safety. FWC has determined that, based upon data received from the City and the extensive record establish in this case, including the testimony of Major Paul Ouellette, the Section Leader of the FWC Boating and Waterways Section, that there is no need for modification of the existing Slow Speed Minimum Wake boating restricted areas in Naples Bay. Regulatory markers implementing such modifications are, therefore, not needed "for safety or navigation purposes." § 327.40(1), Fla. Stat.. See also Fla. Admin. Code R. 68D-23.105(1)(b).

**FWC'S AUTHORITY TO ADOPT, MODIFY OR REJECT
AN ADMINISTRATIVE LAW JUDGE'S RECOMMENDED ORDER**

Pursuant to section 120.57(1)(I), Florida Statutes, FWC has the authority to adopt the recommended order of the Administrative Law Judge as the final order of the agency.

RULING ON RESPONDENT CITY OF NAPLES AND INTERVENORS' EXCEPTIONS

Exception One.

The City and Intervenors took exception to the Conclusions of Law set forth in paragraphs 109-110, 114, 119-122 of the Recommended Order, contending that these conclusions usurped judicial authority and abrogated municipal home rule. FWC does not have substantive jurisdiction over judicial authority or the limits of municipal home rule. The 1999 amendment to a provision in the Administrative Procedures Act, presently codified at section 120.57(1)(I), Florida Statutes, added "over which it has substantive jurisdiction" immediately following the language forbidding agencies from rejecting or modifying conclusions of law. See ch. 99-379, § 6, Laws of Fla, at 3973-74. The effect of this amendment was to "outlaw[] a referring agency's rejecting or modifying the administrative law judge's conclusions of law unless the referring agency has 'substantive jurisdiction.'" See *Barfield v. Dep't of Health*, 805

So.2d 1008, 1010-1011 (Fla. 1st DCA 2001) quoting *Dep't of Children & Families v. Morman*, 715 So. 2d 1076, 1077 (Fla. 1st DCA 1998) (Judge Benton, dissenting). This 1999 amendment was “a direct legislative response to the concurring opinion in *Morman* and an acceptance of Judge Benton's dissenting opinion therein.” *Barfield* at 1011. Therefore, Exception One is denied.

Exception Two

The City and Intervenors took exception to the Conclusions of Law set forth in paragraphs 109-110, 114, 119-122 of the Recommended Order, contending that these conclusions are clearly erroneous. The Second District Court of Appeal specifically agreed with and quoted those conclusions of law in its opinion. *Collier County Bd. Of County Comm'rs v. FWC*, --- So.2d ----, 33 Fla. L. Weekly D2181 (Fla. 2d DCA 2008), *slip op.* at pages 8-12. Therefore, Exception Two is denied.

Exception Three

The City and Intervenors took exception to the Conclusions of Law set forth in paragraphs 118 and 118-120 of the Recommended Order, contending that the interpretations of rule 68D-23.105, Florida Administrative Code, expressed in these conclusions are in conflict with the governing statutes. These Conclusions of Law are among those with which the Second District Court of Appeal specifically agreed and quoted in its opinion. *Id.* Therefore, Exception Three is denied.

Exceptions Four, Five, Six, and Seven

The City and Intervenors took exception to the Conclusions of Law set forth in paragraphs 91 through 106 of the Recommended Order, contending that these conclusions pertaining to standing of the petitioners were not supported by competent substantial evidence and that the petitioners' interests are not within the zone of interest the regulations protect. The

Second District Court of Appeal specifically held “that the ALJ properly determined that the Petitioners have standing to challenge the issuance of the waterway marker permit.” *Id.*, *slip op.* at page 3. Therefore, Exceptions Four, Five, Six, and Seven are denied.

Exception Eight

The City and Intervenors took exception to the Findings of Fact set forth in paragraphs 49-56 and 61 of the Recommended Order, contending that the evidence supporting these findings, the studies and expert testimony of Dr. Edward Baker, was improperly admitted and, because of this, that these findings are not supported by competent substantial evidence. The admissibility of evidence is a question of law, not an issue of fact. The admissibility of evidence is not a matter over which the FWC has substantive jurisdiction. The FWC is “barred from rejecting an evidentiary conclusion of law by section 120.57(1)(I).” *Barfield v. Dep’t of Health*, 805 So.2d 1008, 1010 (Fla. 1st DCA 2001).

The City of Naples itself relied on the studies prepared by Dr. Baker in submitting its application for the disputed Waterway Marker Permit and those studies are part of the record in this matter. Record at pp. 102- 141, 1365-1519. Dr. Baker’s testimony is also part of the record in this matter. “Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence.” *Stinson v. Winn*, 938 So. 2d 554, 555 (Fla. 1st DCA 2006). The Administrative Law Judge found that Dr. Baker’s studies and testimony, supported by the testimony of FWC Major Paul Ouellette, Naples Police Department Officer Russ Ayers, Captain Allen Walburn, and Captain Eric Alexander to be “more compelling, creditable, and persuasive, than [the testimony] and other evidence offered by the City or Intervenors.” Recommended Order at ¶ 83.

The FWC is “not free to reweigh the evidence presented at the hearing, but rather [is] limited to determining whether some competent substantial evidence was presented which would

support the hearing officer's conclusions.” *South Fla. Water Mgt. Dist. V. Caluwe*, 459 So.2d 390, 394-395 (Fla. 4th DCA 1984). Because the record is not devoid of competent substantial evidence supporting the Findings of Fact set forth in paragraphs 49-56 and 61 of the Recommended Order, the FWC cannot modify or reject these Findings of Fact. See *Heifetz v. Fla. Dep't of Business Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Therefore, Exception Eight is denied.

Exception Nine

The City and Intervenors took exception to the Conclusions of Law set forth in paragraph 123 of the Recommended Order, contending that whether or not the proposed speed zones would make the bay safer is irrelevant. “At issue was whether areas of Naples Bay were congested, subject to hazardous water levels or currents, or otherwise posed a significant risk of collision or a significant threat to public safety.” *Collier County Bd. Of County Comm'rs v. FWC*, --- So.2d ---, 33 Fla. L. Weekly D2181 (Fla. 2d DCA 2008), *slip op.* at page 5. See Fla. Admin. Code R. 68D-23.105(1)(b)4-6 (criteria for permit approval). The Second District Court of Appeal held that the Administrative Law Judge correctly determined the appropriate interpretation of the waterway marker rule. See *Collier County*, *slip op.* at 12. Therefore, Exception Nine is denied.

Exception Ten

The City and Intervenors took exception to the Conclusions of Law set forth in paragraphs 124 and 125 of the Recommended Order, contending that the City's simple recitation in the ordinance and in the City's marker permit application that “Naples Bay is subject to unsafe levels of vessel traffic congestion” was legally sufficient to meet the criteria in rule 68D-23.105(1)(b)4, Florida Administrative Code. The Second District Court of Appeal rejected this contention. See *Collier County*, *slip op.* at 10-12. Therefore, Exception Ten is denied.

Exception Eleven

The City and Intervenors took exception to the Conclusions of Law set forth in paragraph 126 of the Recommended Order, contending that the City's simple recitation in the ordinance and in the City's marker permit application that "Naples Bay is subject to hazardous water levels or currents, or contains other navigational hazards" was legally sufficient to meet the criteria in rule 68D-23.105(1)(b)5, Florida Administrative Code. The Second District Court of Appeal rejected this contention. See *Collier County, slip op.* at 10-12. Therefore, Exception Eleven is denied.

Exception Twelve

The City and Intervenors took exception to the Findings of Fact set forth in paragraph 67 and the Conclusions of Law set forth in paragraphs 127-130 of the Recommended Order, contending that the City's simple recitation in the ordinance and in the City's marker permit application that "Naples Bay is an area that accident reports, uniform boating citations, vessel traffic studies, or other creditable data demonstrate a significant risk of collision and threat to public safety" was legally sufficient to meet the criteria in rule 68D-23.105(1)(b)6, Florida Administrative Code. The Second District Court of Appeal rejected this contention. See *Collier County, slip op.* at 10-12.

Moreover, even if the FWC grants this exception and rejects the Conclusion of Law set forth in paragraphs 127-130, "[r]ejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact" set forth in paragraph 67. § 120.57(1)(l), Fla. Stat. The Administrative Law Judge specifically found "that the proposed slow speed zones are not in areas where accident reports, uniform boating citations, vessel traffic studies, or other creditable data demonstrate a significant risk of collision or significant risk to public safety." Recommended Order at ¶ 83. No exception has been filed with regard to this Finding of Fact

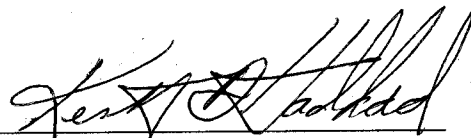
and this finding is amply supported by competent substantial evidence. Therefore, Exception Twelve is denied.

WHEREFORE, IT IS HEREBY ORDERED:

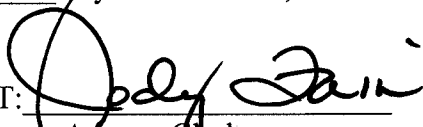
1. This order rescinds the previous Final Order issued by FWC on March 21, 2007.
2. FWC adopts all of the Administrative Law Judge's Findings of Fact found in Paragraphs 1 through 83.
3. FWC adopts all of the Administrative Law Judge's recommended Conclusions of Law found in Paragraphs 84 through 130.
4. Exceptions 1 through 12 are denied as discussed above.
5. The City of Naples's application for a permit to place regulatory markers implementing ordinance 04-10664 is **denied**.

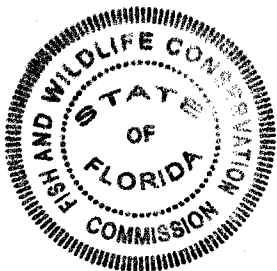
Any party to this order has the right to seek judicial review of the order under section 120.68 of the Florida Statutes by the filing of a notice of appeal under rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Commission in the Office of General Counsel, 620 South Meridian Street, 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.

APPROVED AND ORDERED in a noticed public meeting by the Florida Fish and Wildlife Conservation Commission in Key West, Monroe County, Florida, the third day of December, 2008, and executed on this 10th day of December, 2008.

ATTEST: 
Kenneth Haddad
Executive Director
Florida Fish and Wildlife
Conservation Commission

Filed with the Agency Clerk
This 10th day of December, 2008

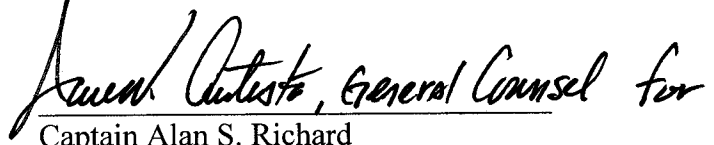
ATTEST: 
Agency Clerk



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above REVISED FINAL ORDER and foregoing has been furnished by United States mail to the parties listed below, this 10th day of December, 2008.

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION



Captain Alan S. Richard
Assistant General Counsel
620 South Meridian Street
Tallahassee, Florida 32399-1600
Florida Bar No. 54135
Telephone: (850) 487-1764
Fax: (850) 487-1790

Captain Allen Walburn
678 14th Avenue
Naples, Florida 34102

Mr. Dave Sirkos
5th Avenue South
Naples, Florida 34102

Captain Jack Hail
2675 Bayview Dr.
Naples, Florida 34112

Captain Eric Alexander
654 Squire Circle
Naples, Florida 34104

Mr. James Pergola
1830 Kingfish Rd.
Naples, Florida 34102

Mr. Douglas Finlay
3430 Gulf Shore Blvd. N., 5H
Naples, Florida 34103

Mr. Jeffrey A. Klatzkow
Assistant County Attorney
Collier County
3301 East Tamiami Trail
Naples, Florida 34112-4902

Mr. Frank Matthews
D. Kent Safriet
Hopping Green & Sams
P.O. Box 6526
Tallahassee, FL 32314

Mr. Robert Pritt, Esq.
850 Park Shore Drive
Trianon Centre, Third Floor
Naples, Florida 34103-3587

Ms. Mimi S. Wolock, Esq.
1112 Trial Terrace Drive
Naples, FL 34103-2306

Mr. Andrew Dickman, Esq.
Conservancy of Southwest Florida, Inc.
1450 Merrihue Drive
Naples, Florida 34102-3449