

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FILED
2007 SEP 12 P 1:17
DIVISION OF
ADMINISTRATIVE
HEARINGS

ANDREW MARSHALL,)

Petitioner,)

vs.)

CITY OF MIAMI and DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)

Respondents.)
/

OGC CASE NO. 06-1066
DOAH CASE NO. 07-0293

FINAL ORDER

On July 26, 2007, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order ("RO") to the Department of Environmental Protection ("DEP") in this administrative proceeding. Copies of the RO were served on the Petitioner, Andrew Marshall ("Marshall"), and the Respondent, City of Miami ("City"). A copy of the RO is attached hereto as Exhibit A. No Exceptions to the Recommended Order were filed on behalf of any of the parties. The matter is now before me, as the Secretary for DEP, for entry of a Final Order.

BACKGROUND

This matter began on May 27, 2005, when Respondent, Department of Environmental Protection (Department), issued a notice advising the City that its application for an Environmental Resource Permit and consent to use sovereign submerged lands to develop a managed mooring field in the Dinner Key Marina had been approved. A third party in OGC Case No. 05-1497 challenged the proposed issuance of that Permit, and a final permit document was eventually issued on May 26,

2006. The proposed permit which has been challenged is identified as the Consolidated Environmental Resource Permit and Letter of Consent to Use Sovereign Submerged Lands, Permit No. 0217762-002-EI ("Permit").

Because the Department had not given personal written notice of its action to Petitioner, Andrew Marshall, in 2006 it agreed to allow Mr. Marshall to file a petition to contest the issuance of the Permit. After two filings were dismissed without prejudice, on October 23, 2006, Petitioner filed a thirty-two page Second Amended Petition (Amended Petition) with the Department challenging the issuance of the Permit on several grounds. The Department forwarded the matter to the Division of Administrative Hearings on January 17, 2007, with a request that an administrative law judge be assigned to conduct a hearing.

Notice of Hearing dated January 24, 2007 scheduled the matter for final hearing on May 22, 23 and 24, 2007, in Miami, Florida. However, the hearing was completed on May 22, 2007.

Numerous discovery and procedural disputes arose during the course of this proceeding and the resolutions of those disputes are found in various preliminary Orders issued by the ALJ.

On May 21, 2007, or one day prior to the final hearing, Petitioner filed a paper styled "Motion for Order Revoking FDEP Permit and to Stay Proceedings until Procedurally Mandated Public Hearings are Held." In addition, at the final hearing, Petitioner filed papers styled as "Objection to Hearing" and "Objection to Order Denying Motion for Continuance and Motion for Reconsideration" (Motions). Based on the written and oral arguments from the parties at the hearing, the Motions were denied by

the ALJ.

At the outset of the final hearing, the ALJ granted the Department's Motion in Limine/Motion to Strike certain allegations in the Amended Petition. By doing so, the only issue remaining to be adjudicated was whether the City's project on sovereign submerged lands satisfies the criterion in Florida Administrative Code Rule 18-18.006(3)(b)(ii), which requires that in order to use sovereign submerged lands in the Biscayne Bay Aquatic Preserve held by the Board of Trustees of the Internal Improvement Trust Fund (Board), an applicant must affirmatively demonstrate that the use, and the project planned in conjunction with the use, are in the public interest. No other relevant issues were raised in Petitioner's pleading.

Prior to the taking of evidence, Petitioner excused himself from further participation in the hearing and left the room. The City presented the testimony of Stephen Bogner, City Marinas Manager; Andrew M. Nicholson, a professional engineer and professional land surveyor and accepted as an expert; and Geoffrey C. Lane, a marine biologist and accepted as an expert. Also, the City offered City Exhibits 1 through 12, which were received in evidence. The Department offered Department Exhibits 1-31 and 33, which were received in evidence.

On May 29, 2007, Petitioner filed a Motion to Disqualify (Motion) and on June 1, 2007, an unsworn "Certification of Good Faith" regarding his Motion. The ALJ denied the Motion. See, e.g., Platman v. State, 32 Fla. L. Weekly D1658 (Fla. 5th DCA, July 6, 2007)(motion for disqualification must be timely filed and signed under oath or accompanied by a separate affidavit).

The Transcript of the hearing was filed on June 28, 2007. Respondents jointly

filed proposed Findings of Fact and Conclusions of Law on July 9, 2007. Petitioner filed no papers.

RECOMMENDED ORDER

The Recommended Order contains the ALJ's unchallenged findings of fact:

A. The Parties

1. Petitioner resides at the Dinner Key Anchorage, Coconut Grove, Florida. He has filed an Amended Petition challenging the issuance of the Permit. However, he presented no evidence at hearing to support the allegations in his Amended Petition or to demonstrate how his substantial environmental interests are affected by the Department's action. Therefore, he lacks standing to bring this action.

2. The Department is the state agency with regulatory jurisdiction over the disputed activities. The Department has proposed to authorize the construction of a managed mooring field in, on, and over surface waters in the Biscayne Bay Aquatic Preserve in Miami. (A mooring field uses anchoring devices that are embedded into the bay bottom and used to secure boats in the subject area.) The City will operate and manage the mooring field in accordance with a management plan attached to and incorporated in the proposed Permit.

3. The City is the applicant for the Permit. It owns and operates three municipal marinas including the Dinner Key Marina in Coconut Grove. The City proposes to create a managed mooring field in the waters off Dinner Key Marina. Those waters are part of the Biscayne Bay Aquatic Preserve, a legislatively created aquatic preserve that is to "be preserved in an essentially natural condition." See § 258.397(1), Fla. Stat. (2006).

B. Background

4. In the waters off Dinner Key Marina, there is an unregulated, unmanaged anchorage area. (Unlike a mooring area, in an anchorage area vessel owners drop their own anchoring devices, such as I-beams, steel beams, cement blocks, engine blocks, and other similar devices down to the bay bottom to secure their vessels.) In 1994, the City sought the assistance of the Miami-Dade County Department of Environmental Resource Management (DERM) to examine the effects of the Dinner Key Anchorage on City waters and to determine the feasibility of creating a managed mooring field in the area.

5. The historical use of the unregulated, unmanaged anchorage area by vessel owners created issues for the City. The City's concerns included diminished water quality from illegal vessel discharges of waste and a chronic problem with derelict vessels. Also, they included the improper use of anchors and ad hoc anchoring systems that damaged the seagrass and other submerged resources of the bay bottom. In addition, during Hurricane Wilma in 2005, there were two recorded deaths of anchorage vessel owners who elected to stay on their vessels and which utilized unsafe anchoring systems.

6. DERM conducted a biological assessment of the City-owned bay bottom adjacent to the Dinner Key Marina on December 7, 1994, and January 11, 1995. The assessment had three purposes: (1) to identify specific areas which are best suited for a designated mooring facility; (2) to identify environmentally sensitive areas where anchoring or mooring should be prohibited or discouraged; and (3) to identify the location of submerged and/or derelict vessels.

7. DERM identified five main mooring areas and made recommendations as to future designation and use. Three of those areas are the subjects of the City's Permit application. The "shallow south anchorage" (identified as the vessel exclusion area or Area 5 in the Permit) had a water depth ranging from one to four feet. Seagrass was dense throughout the area but anchor lines, chains, and debris had created some barren areas. The debris included vessel hulls, engine blocks, outboard motors, and other items comprising the ad hoc anchoring systems. Based on the shallow water depth and the presence of a diverse benthic community providing considerable habitat value, DERM recommended that no vessels moor or anchor in the "shallow south anchorage."

8. The "deep south anchorage" (identified as Project Area 4 in the Permit) lay between the south channel leading into the Dinner Key Marina and vessel exclusion Area 5. Water depth ranged from eight to ten feet. Moderate to sparse seagrass beds were observed in this area. DERM recommended this area as a potential overflow mooring area if the "east anchorage" did not provide sufficient mooring space.

9. The "east anchorage (identified as Project Area 3 in the Permit) was located between the main and south channels leading into the Dinner Key Marina. DERM recommended this area as the principal mooring facility based on the existing water depth and presence of minimal benthic resources.

10. DERM's submerged and/or derelict vessels survey counted twenty to forty wrecked and derelict vessels sunk in the waters within the assessment area. DERM also observed that the existing debris and anchoring systems drag across the bay bottom and destroy existing seagrass beds. DERM warned the City that it was liable for

adverse impacts to submerged resources of the City-owned bottomlands.

11. In 2000, the City sought the assistance of the Department to help create a Technical Assistance Team (TAT). The purpose of the TAT was to examine the Dinner Key anchorage area, gather information from various experts, conduct public meetings, and make recommendations to the City concerning creating a managed mooring and anchoring facility. The TAT consisted of volunteers from the Department, the United States Coast Guard, the City's Marine Patrol, the Florida Fish and Wildlife Conservation Commission, assorted marine industry professionals, and the boating public, including several vessel owners from the Dinner Key anchorage.

12. The TAT volunteer group studied the current and future anchorage situation. The group convened public meetings at City Hall located at Dinner Key Marina for one year beginning in June 2001. The TAT then submitted a Final Report to the City Manager and the City's Waterfront Advisory Board in June 2002.

13. The Final Report consisted of extensive findings and recommendations regarding the creation of Managed Anchorage and Mooring Fields in the Dinner Key Marina area. That document has been received in evidence as City Exhibit 3 and Department Exhibit 29. The Final Report identified the physical features, shoreline activities, benthic resources, and historic and existing uses of the Dinner Key Marina harbor area. It also identified and described five potential mooring fields that were approximately the same five identified by DERM in 1995. In terms of physical characteristics, benthic resources, and existing uses, the areas were largely unchanged since the 1995 DERM assessment.

14. The Final Report identified several management concerns for the Dinner Key

study area that needed to be addressed by the City. These included lack of full-service boatyard facilities in the area; inadequate dinghy access to uplands; inadequate use by boaters in the area of available sewage pump out facilities at the Dinner Key Marina; unauthorized repair of vessels on site; and upland stormwater runoff. Other concerns included submerged debris and ad hoc anchor systems, which caused adverse impacts to valuable benthic resources. Also, unsecured anchoring systems presented serious safety concerns even during mild storm events. Accordingly, the Final Report concluded that penetrating anchor systems would provide the highest vessel security and minimize benthic disturbances.

15. The Final Report also concluded that approximately ten percent of the vessels surveyed were abandoned or neglected and presented a significant navigational and public safety concern. To remedy that situation, since 2003 the City has spent \$345,000.00 removing over two hundred and forty damaged and derelict vessels from City waters. Approximately ninety percent were removed from the Dinner Key area.

16. Based on the TAT's report and recommendations, the City proceeded with the design and permitting of managed mooring fields in the Dinner Key Marina area.

C. The Proposed Permit

17. In contrast to an area of random or voluntary mooring, a managed mooring field will have an engineered anchor and buoy system at each designated mooring. The City's proposed design is an auger anchor that is screwed into the bay bottom to a depth of fifteen feet or more. A synthetic line with shock absorbers vertically connects to a buoy so that there is no horizontal chain dragging across the submerged resources

of the bay bottom.

18. The City's application proposes a managed mooring field that will accommodate two hundred twenty-five vessels in Phase I identified as Areas 3 and 4 on sheet 1 of 27 of the Permit drawings. The mooring field will accommodate vessels ranging from twenty-five to one hundred and ten feet in length. Areas 1 and 2 are not proposed to be used for mooring as a part of this project and Area 5 is a vessel exclusion area due to the depths and resources that are present. Only Area 5 contains sovereign submerged lands owned by the Board. Sheet 1 of 7 of the Permit drawings shows that the southeast border of the City-owned submerged lands run through Area 5, such that only eighteen regulatory buoys will be installed on sovereign submerged lands. If Areas 3 and 4 reach capacity and future mooring is proposed in Area 6, then a new application must be submitted to the Department for permitting of Phase II. The Permit does not authorize mooring in Area 6.

19. The project is located in Biscayne Bay, within the Biscayne Bay-Card Sound Aquatic Preserve, an Outstanding Florida Water, adjacent to Dinner Key Marina. The City in accordance with the management plan attached to the Permit will manage the entire mooring field. That plan has been received in evidence as Department Exhibit 21. The project consists of installing seventy regulatory buoys to identify the mooring field as well as vessel exclusion areas as shown in sheet 7 of 7, and installing two hundred twenty-five mooring buoys to be used by all of the vessels within the managed mooring field. Both the mooring buoys as well as the regulatory buoys will be installed using auger anchors as shown in sheet 7 of 7 of the permit drawings.

20. Eighteen regulatory buoys will be installed on sovereign submerged lands as

part of the vessel exclusion area (Area 5). Creation of the vessel exclusion area presents many benefits to seagrass and animal resources in this area. The shallow depth throughout Area 5 increases the potential for adverse impacts from propeller scarring, groundings, ad hoc anchoring systems, and derelict and abandoned vessels.

Based upon the ALJ's unchallenged factual findings, the ALJ found that the proposed project meets the public interest test set forth in Florida Administrative Code Rule 18-18.006(3)(b)(ii), which is a part of Florida Administrative Code Rule Chapter 18-18, governing the sale, lease, transfer, or use of Board-owned submerged lands within the Biscayne Bay Aquatic Preserve.

CONCLUSION

Parties to a formal administrative proceeding must alert reviewing agencies to any perceived defects in DOAH hearing procedures, or in the ALJ's findings of fact, by filing exceptions to DOAH recommended orders. See Couch v. Comm'n on Ethics, 617 So. 2d 1119, 1124 (Fla. 5th DCA 1993); Florida Dep't of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Here, the ALJ concluded in the RO that the City had demonstrated that the proposed project meets the public interest test set forth in Florida Administrative Code Rule 18-18.006(3)(b)(ii).

Having considered the Recommended Order and other matters of record and having reviewed the applicable law, it is therefore ORDERED:

A. The Recommended Order is adopted in its entirety and incorporated herein by reference.

B. The application for the issuance of the Consolidated Environmental Resource Permit and Letter of Consent to Use Sovereign Submerged Lands, No.

10217762-002-EI to the City of Miami for the Dinner Key Managed Mooring Field in the Biscayne Bay Aquatic Preserve in Miami is GRANTED.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; 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 Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 7th day of September, 2007, in Tallahassee, Florida.


STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



MICHAEL W. SOLE
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

 9/10/07
CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

Andrew Marshall
Post Office Box 330561
Miami, FL 33233-0561

Kevin R. Jones, Esquire
City Attorney's Office
444 Southwest Second Avenue
Suite 945
Miami, FL 33130-1910

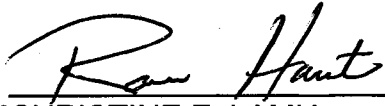
Claudia Llado, Clerk and
Donald R. Alexander, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Francine M. Ffolkes, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 14th day of September, 2007.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



For CHRISTINE E. LAMIA
Sr. Assistant General Counsel
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242