

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

KISSIMMEE RIVER VALLEY	)	
SPORTSMAN ASSOCIATION, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-6150RE
	)	
SOUTH FLORIDA WATER MANAGEMENT	)	
DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

On November 24, 2009, a telephone hearing was held to consider a motion to dismiss Petitioner's Petition for Emergency Administrative Hearing (Petition). On November 23, 2009, Petitioner filed a response opposing the motion. After hearing argument of counsel, the motion to dismiss is granted and the hearing scheduled for December 7-8, 2009, is cancelled.

On or about November 6, 2009, Petitioner filed the Petition with the Division of Administrative Hearings. The Petition was filed pursuant to Sections 120.56(3) and 120.57(1), Florida Statutes, as a challenge to an alleged existing rule.

Petitioner alleges in part that Respondent's Resolution No. 2008-1212 (Resolution), adopted on December 2, 2008, is an existing rule to the extent the Resolution restricts access to Johnson Island as more particularly described in Exhibit C to the Petition, which purports to be a map titled "Johnson Island Airboat Use," designating a proposed airboating area.

Petitioner claims that the Resolution contravenes Section 373.1391(1)(b), Florida Statutes,<sup>1/</sup> and Florida Administrative Code Rule 62-402.070, to the extent access is restricted and alleged impermissible and potentially dangerous restrictions are being placed on the use of Johnson Island.

In opposing the Petition, Respondent suggests that the "Resolution" is not a rule or order, but merely an executive

decision from the District in its role as a land owner requesting the Florida Fish and Wildlife Conservation Commission (Commission) to initiate rulemaking to establish certain rules pertaining to hunting on District lands. Respondent's motion at 2 (citation omitted). (The Commission adopted a rule in 2009 and, in part, provided general regulations pertaining to the Kissimmee Chain of Lakes Area as follows: "6. The use of airboats is prohibited in those areas posted as closed to airboat use." Fla. Admin. Code R. 68A-15.006(4)(c)6. Counsel agreed that Johnson Island is within the Kissimmee Chain of Lakes Area.)

In ruling on a motion to dismiss, the factual allegations of the Petition, including exhibits attached to and incorporated in the Petition, must be accepted as true and any factual matters outside the Petition and exhibits may not be considered. St. Francis Parkside Lodge of Tampa Bay v. Dep't of Health & Rehabilitative Servs., 486 So. 2d 32, 33 (Fla 1st DCA 1986); Harry Pepper & Assocs. Inc. v. Lassetter, 247 So. 2d 736, 737 (Fla. 3d DCA 1971).

A challenge to an existing rule is limited to a facial challenge to the validity of a rule, whereas the remedy for an erroneous application of a rule is a proceeding pursuant to Section 120.57, Florida Statutes. See Beverly Health & Rehabilitative Servs., Inc. v. Agency for Health Care Admin., 708 So. 2d 616 (Fla. 1st DCA 1998); Hasper v. Dep't of Admin., 459 So. 2d 398, 400 (Fla. 1st DCA 1994); Fairfield Communities v. Fla. Land and Water Adjudicatory Comm'n, 522 So. 2d 1012 (Fla. 1st DCA 1988).

On its face, the Resolution authorizes the Florida Fish and Wildlife Commission (Commission) to establish the Kissimmee Chain of Lakes as a managed area in accordance with Florida Administrative Code Rule 68A-25.042 and certain terms and conditions set forth in paragraphs 1 through 8 of the Resolution, including paragraph 7, which provides: "Allow seasonal airboat access into the southern marsh area of Johnson Island to facilitate hunting access. This is proposed as a one year trial to be evaluated for compliance."

The Resolution is not a rule. The Resolution, on its face, does not implement, interpret, or prescribe law or policy. See § 120.52(16), Fla. Stat. Rather, it has every appearance of being executive in nature authorizing the Commission to initiate rulemaking, subject to terms and conditions. See generally Lee

County v. South Fla. Water Mgmt. Dist., 766 So. 2d 1103 (Fla. 2d DCA 2000).

It appears that Petitioner is dissatisfied with action taken by Respondent's imposing restrictions on airboat access on Johnson Island. To the extent Petitioner's substantial interests are affected by action taken by Respondent regarding, for example, the accessibility on Johnson Island, then any administrative relief must be requested pursuant to Sections 120.569(1) and 120.57, Florida Statutes. See Hasper v. Dep't of Admin., 459 So. 2d at 400.<sup>2/</sup>

DONE AND ORDERED this 25th day of November, 2009, in Tallahassee, Leon County, Florida.



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CHARLES A. STAMPELOS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 25th day of November, 2009.

ENDNOTES

<sup>1/</sup> Subsection 373.1391(1)(b) provides in part that "[w]henver practicable, such lands shall be open to the general public for recreational uses."

<sup>2/</sup> In a challenge to an existing rule, "[t]he administrative law judge may declare all or part of a rule invalid. The rule or part thereof declared invalid shall become void when the time for filing an appeal expires." § 120.56(3)(b), Fla. Stat. However, the ALJ does not have authority to grant injunctive relief. See generally Biltmore Constr. Co. v. Fla. Dep't of Gen. Servs., 363 So. 2d 851, 854 (Fla. 1st DCA 1978); § 26.012(2)(c) and (3), Fla. Stat. See also Greenberg v. Fla.

State Bd. of Dentistry, 297 So. 2d 628 (Fla. 1st DCA 1974)("Administrative bodies have no common law powers. They are creatures of the Legislature and what powers they have are limited to the statutes that create them.")(citations omitted.).

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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 one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second 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.