

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LISE BAUMAN,

Petitioner,

vs.

Case No. 15-3163

MARCO RIVER MARINA/ROSE MARINA
AND FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondents,

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on August 24, 2015, by video teleconference in Tallahassee, Florida and Ft. Myers, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lise Jay Bauman
Unit V-8
167 North Collier Boulevard
Marco Island, Florida 34145

For Respondent Marco River Marina/Rose Marina:

Daniel High
951 Bald Eagle Drive
Marco Island, Florida 34145

For Respondent Florida Fish and Wildlife Conservation
Commission:

Ryan Smith Osborne, Esquire
Florida Fish and Wildlife
Conservation Commission
620 South Meridian Street
Tallahassee, Florida 32399-1600

STATEMENT OF THE ISSUE

The purpose of this hearing is to determine whether Permit No. LSNR-15-00004, for the removal of inactive burrowing owl nests, should be issued as proposed by the Florida Fish and Wildlife Conservation Commission (Commission).

PRELIMINARY STATEMENT

On January 9, 2015, the Commission issued a permit, No. LSNR-15-00004 (Permit), to Respondent, Marco River Marina/Rose Marina (Respondent or Rose Marina). The Permit authorized the destruction of two inactive nest burrows of the burrowing owl, a state-designated species of special concern. The Permit did not authorize the killing of birds or destruction of active nests or eggs.

An Election of Rights and Petition for Administrative Proceeding requesting a hearing to challenge the Permit, dated March 1, 2015, was filed by Petitioner and, thereafter, referred to the Division of Administrative Hearings on June 2, 2015.

On August 20, 2015, the Permit applicant, Rose Marina, was added as a party to the proceeding.

The final hearing commenced as scheduled on August 24, 2015, and was completed on that date.

At the hearing, the Commission took the lead in presenting evidence of Rose Marina's entitlement to the Permit and called as witnesses: Angela Williams, the Commission's protected species permitting coordinator for terrestrial and avian species; Nancy Richie, an environmental consultant and, at all times relevant to this proceeding, an environmental specialist for the City of Marco Island; Daniel High, Rose Marina's general manager; and Lt. Patrick Walsh, the Commission's field supervisor for the Ft. Myers office. Ms. Williams and Ms. Richie were tendered as experts and accepted as having the scientific, technical, or other specialized knowledge to assist the undersigned in understanding the evidence or in determining a fact in issue. Commission's Exhibits B through H were received in evidence.

Petitioner testified on her own behalf, and called Rhonda McAuliffe Gloodt, a resident of Marco Island, as a witness. Petitioner's Exhibits A through K and M were received in evidence.

A one-volume Transcript was filed on September 29, 2015. The parties timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2015) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, Lise Bauman was, at all times pertinent to this proceeding, a resident of Marco Island. She is employed in the tourism industry as a bartender on a dinner cruise boat.

2. Respondent Marco River Marina/Rose Marina, owns and operates a marina on Marco Island, Florida, which includes a dry-storage boat facility. The marina is located at 951 Bald Eagle Drive, Marco Island, Florida. A vacant lot at 865 Magnolia Court, Marco Island, Florida, is contiguous to the marina. Both parcels are under common ownership.

3. The Florida Fish and Wildlife Conservation Commission is an agency of the state, created pursuant to Article IV, section 9 of the Florida Constitution, to "exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life."

4. The burrowing owl (*Athene cunicularia*) has been designated by the Commission as a species of special concern. The burrowing owl is not a federally-designated endangered or threatened species.

5. Burrowing owls are, as their name implies, ground-nesting owls that excavate burrows in open, vacant areas.

Burrows can extend up to eight feet in length. Most burrows have a single entrance/exit.

6. Burrowing owls range throughout all 67 Florida counties. Their numbers have dwindled in the Panhandle and North Central Florida regions, and their population remains heaviest in South Florida.

7. On Marco Island, rights-of-way, parks, and vacant lots provide habitat for nesting owls. As vacant lots are constructed upon, habitat options on Marco Island are reduced. Nonetheless, despite significant construction and development on Marco Island over the past 15 years, active owl burrows on Marco Island have increased in number during that period from roughly 30 to between 100 and 150. The increase is largely the result of compliance with Commission conservation rules, education of property owners and developers, and identification and marking of burrow sites to protect from inadvertent destruction.

8. Burrowing owls are quick to relocate if their burrows are disturbed or become unsuitable. If there are suitable nesting sites nearby -- generally any open, treeless area with well-drained soils -- burrowing owls will not hesitate to move and construct new burrows.

9. The normal breeding season for burrowing owls in the area runs from February 15 through July 10, although weather and other conditions may result in breeding before or after the

normal season. However, Ms. Richie, who had surveyed burrowing owl sites on Marco Island for the previous 15 years, never observed owl chicks or fledglings in the months of December or January.

10. In order to give burrowing owls that are displaced as the result of a "take" permit time to relocate, permitting is typically done before breeding season starts. Nonetheless, the Commission typically requires applicants to provide a report from an environmental consultant to confirm the status of burrows on a parcel slated for development. If the report reveals that burrows contain active nests, the proposed activities will not be permitted.

11. The parcel at 865 Magnolia Court was, at the time the Permit application was filed, an undeveloped grass lot. It was mowed regularly, and had no mid-story vegetation. The soil on the property is regarded as disturbed or urban soil.

12. Burrowing owls were present at 865 Magnolia Court for the last nine years. The lot had two burrowing owl burrow areas which had been individually marked by placing PVC pipes at the corners, with nylon cords to "enclose" each protected area. Each of the marked areas contained two burrows in close proximity. Thus, although there were two defined areas, there were four individual burrows.

13. Rose Marina is engaged in a marina renovation project, part of which involves the reconstruction of its dry-storage building at 951 Bald Eagle Drive. During the period of renovation, boats stored in the dry-storage building will have to be temporarily stored at a different location. In order for Rose Marina to maintain its customers and earn income to remain in business, the boats must be stored on its property, rather than sent to other facilities or locations.

14. It was determined that the most appropriate place for the temporary boat storage was the contiguous lot at 865 Magnolia Court.

15. Prior to making application for the Permit, Mr. High contacted Ms. Richie to discuss the owl burrows on the 865 Magnolia Court lot. Ms. Richie was familiar with the burrows on the property, having originally marked them nine years previously. She is well aware of the physical features and animal behaviors that are indicative of an active nesting burrow.

16. As part of their initial discussion, Mr. High and Ms. Richie discussed the possibility of altering the proposed boat storage area to avoid the burrows. However, due to the massive nature of the project and the location of the burrows in the center of the property, avoidance was determined to be impractical.

17. Ms. Richie inspected the property on November 5, 2014, to assess whether the burrows were active or inactive. She knew from her regular monitoring of the property that the burrows had not been used for nesting during the 2013 and 2014 breeding seasons.

18. At the time of Ms. Richie's inspection, the burrow areas were inhabited by a single adult owl. The owl exhibited no breeding behavior. Male owls will "decorate" the mound of a burrow with feathers, vegetation, bits of trash, and other materials designed to attract the attention of females interested in courtship, and offer some degree of camouflage for an active nesting burrow. The single owl on the property had not decorated the burrows to suggest that they were active.

19. When nests are active, male owls will spread their wings and offer vocal protestations if approached. The owl at 865 Magnolia Court exhibited no such behavior.

20. Paired owls usually sit together. Even if a female owl is on a nest in an active burrow, she will frequently peek out to see what is occurring. Ms. Richie saw no evidence of another owl at the burrow areas.

21. As a result of her inspection, Ms. Richie provided Rose Marine with a short report, which included her conclusion that "this burrow, under State definitions is considered 'inactive.'"

22. The on-line application for the Permit was submitted on November 6, 2014. The application identified the applicant as Marco River Marina. The project address was given as 951 Bald Eagle Drive, Marco Island, Florida, which is that of the marina itself. However, the application provided the project's township/section/range, latitude and longitude coordinates, and Collier County parcel ID number. Those identifying numbers describe the parcel at 865 Magnolia Court.

23. Given the fact that 951 Bald Eagle Drive and 865 Magnolia Court are contiguous lots, many, including Ms. Richie, regard them as a single parcel and refer to them collectively as Rose Marina.

24. The application for the Permit included a ground-level photograph of the property, and an aerial photograph of the property with depictions of the burrow areas to be affected and the proposed gravel path designed to serve the boat storage area. Furthermore, Ms. Richie's report was clear as to location of the burrow areas proposed for removal. Thus, the Commission understood which parcel was the subject of the authorization.

25. Although the application incorrectly gave the project street address as 951 Bald Eagle Drive, instead of 865 Magnolia Court, there was no evidence that anyone was confused as to the location of the burrows to be affected. Thus, the street

address error in the Permit is of no substantive effect and does not form a basis for denial.

26. The property contained two marked and staked owl burrow areas, each of which contained two burrows. Nonetheless, the Permit authorized the destruction of the "[t]wo (2) inactive burrowing owl nest burrow(s)."

27. The on-line application form has no field for identifying the number of burrows, but required only information as to the number of adult birds, eggs, and flightless chicks. Rose Marina's information as to those application fields was accurate.

28. The application included a map which depicted the burrow areas in the correct location. Having a single reference point is not uncommon for burrow areas with more than one burrow. In that regard, when mapping burrows for the City of Marco Island, Ms. Richie would "just put one dot for one burrow area."

29. The application included a high-quality color photograph of the two marked and staked burrow areas, and a marked aerial photograph of the parcel that accurately depicted the areas. Ms. Richie's report noted the existence of four individual burrows, only two of which she described as well maintained.

30. The error in the Permit as to the number of burrows appears to be one of a misunderstanding of the distinction between the burrows and the burrow areas. There was clearly no intent to mislead the Commission or anyone else as to the number of burrows on the property. Given that all of the burrows were inactive, whether the number of affected burrows was two or four would not have made a difference in the Commission's decision to issue the Permit. Thus, the error in the Permit as to the number of burrows is of no substantive effect and does not form a basis for denial.

31. The Permit described the inactive burrow destruction as being done in association with "seawall renovations," rather than for a gravel path and boat storage. The error was a scrivener's error on the part of the Commission. The application and supporting documentation, including the aerial photograph and emails from Mr. High to the Commission's protected species permitting office, clearly described the project as a temporary boat storage lot.

32. Upon becoming aware of the scrivener's error, and weeks before the filing of the petition, Ms. Williams struck the term "seawall renovations," and re-issued the Permit with the following errata: "FWC oversight; approved activity was construction of gravel walkway for temporary storage of boats. Angela Williams 2/17/2015." The error had no effect on the

issuance of the Permit. Thus, the error in the uncorrected Permit as to the nature of the project is of no substantive effect, and does not form a basis for denial.

33. Ms. Richie monitored the 865 Magnolia Court burrows on a weekly basis from her November 2014, inspection through January 2015. She observed no physical or behavioral evidence of active nesting, saw nothing to suggest that the burrows contained eggs or flightless young, and was confident that only a single adult owl inhabited the two burrow areas. As a result, she concluded that the burrows remained inactive up through the date of their destruction. Her testimony was persuasive, and is credited.

34. The Permit was issued and became effective on January 9, 2015.

35. The destruction of the burrows was done on January 15 and 16, 2015. The act was accomplished by means of a hand shovel. Mr. High indicated that the excavation was done slowly and carefully so as to minimize the risk if an owl was in any of the burrows. No owls, nests, or eggs were encountered in the burrows.

36. Rose Marina personnel fashioned a wooden rod with a cloth duct-taped to the end to probe the burrow before digging down with a shovel, and to flush owls away from the site while the excavation was ongoing. That method was determined to limit

the potential for injury to any owls. No owls were encountered in the burrows.

37. At no time during the process of excavation did an owl retreat into a burrow. Thus, there was no need to insert a burrow scope or flexible tubing into the burrow to flush an owl from the burrow.

38. After the completion of the burrow removal, a fence was constructed around the perimeter of the area used to store boats, and the gravel driveway through the middle of the area was put in. The gravel driveway covers the area previously occupied by the burrows.

39. At the conclusion of the marina renovation activities, the lot at 865 Magnolia Court will be restored to its previous condition.

40. The preponderance of the competent, substantial evidence presented at the hearing provides reasonable assurance that the activities authorized by the Permit will have no impact on the owl that was present at the burrow areas in November 2014, and will not be detrimental to the survival potential of the species.

41. Petitioner observed the permitted activity at some unspecified time after its commencement. On February 9, 2015, after having made a request for public records, Petitioner received a copy of the Permit. The Permit included a notice of

rights which provided, among other information, that "[a] person seeking a hearing on FWC's action shall file a petition for hearing with the agency within 21 days of receipt of written notice of the decision." Petitioner's petition was dated March 1, 2015. The date of its receipt by the Commission is unknown, since it bears no form of date-stamp or acknowledgement, nor is there competent, substantial, non-hearsay evidence in the record to establish the date of receipt.

42. Being employed in the tourism industry, Petitioner understands that tourists enjoy seeing and photographing burrowing owls, which enhances Marco Island's reputation as a desirable destination. Petitioner's interest in the burrowing owls is related to her desire to ensure that tourists continue to come to Marco Island, thus sustaining her livelihood. Petitioner expressed no more than a general "interest in wildlife," and engaged in no activities designed to protect or perpetuate the burrowing owl species.

43. Petitioner raised issues regarding approval by the City of Marco Island of a temporary-use permit for Rose Marina to use the vacant lot at 865 Magnolia Court for boat storage. There was no dispute that the City approved the temporary-use permit, with the dispute being whether the burrow removal under the Commission Permit was done prior to the City's approval of 865 Magnolia Court as a boat storage area. Approval by the City

is not a condition for issuance of the Permit and is not before the undersigned for disposition. Thus, the City of Marco Island temporary-use permit is not relevant to this proceeding.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

Timeliness

45. The Commission has raised the issue of the timeliness of the petition in its Proposed Recommended Order, and asserts that Petitioner should have known of the permitted activities shortly after their occurrence on January 15 and 16, 2015. Alternatively, the Commission asserts that Petitioner should have filed a petition within 21 days of her receipt of the Permit and notice of rights.

46. It is well established that "[a]n agency seeking to establish waiver based on the passage of time following action claimed as final must show that the party affected by such action has received sufficient notice to commence the running of the time period within which review must be sought." Henry v. Dep't of Admin., 431 So. 2d 677, 680 (Fla. 1st DCA 1983); see also Bryant v. Dep't of HRS, 680 So. 2d 1144 (Fla. 3d DCA 1996); Symons v. Dep't of Banking and Fin., 490 So. 2d 1322, 1323 (Fla. 1st DCA 1986). While a waiver of the right to challenge a

permit is commonplace, when the waiver is the result of the passage of time, and not the result of having received a notice, "[w]aiver, [however,] is not a concept favored in the law, and must be clearly demonstrated by the agency [or other party] claiming the benefit." Dep't of Env'tl. Reg. v. Puckett Oil Co., 577 So. 2d 988, 993 (Fla. 1st DCA 1991); see also Terwilliger v. South Fla. Water Mgmt. Dist. and Fla. Power and Light Co., Case No. 01-1504, ¶ 125 (Fla. DOAH Feb. 27, 2002; SFWMD Apr. 16, 2002) ("[W]hile [petitioner] had the burden to prove the merits of his Petition, including his standing, . . . [respondent] had the burden to prove receipt of actual notice more than 21 days before the filing of [petitioner's] Petition.").

47. The burden of proving that Petitioner had adequate notice of the issuance of the Permit more than 21 days prior to the filing of the Petition is on Respondent and the Commission.

48. Respondent and the Commission failed to prove the facts necessary to support a waiver of the right to challenge the Permit based on actual knowledge.

49. On February 9, 2015, Petitioner received a copy of the Permit and notice of rights that established her right to contest the Permit by filing a petition within 21 days of receipt of the notice. The 21st day from February 9, 2015, was March 1, 2015, a Sunday. Thus, the last date for filing the petition was Monday, March 2, 2015.

50. The petition was dated March 1, 2015. As set forth in the Findings of Fact, there was no "received" stamp or other evidence to establish when the petition was received by the Commission, and such information would not be reasonably available to Petitioner.

51. Rule 28-106.111 of the Uniform Rules of Procedure, entitled Point of Entry into Proceedings and Mediation, provides, in pertinent part, as follows:

(1) The notice of agency decision shall contain the information required by Section 120.569(1), F.S. . . .

(2) Unless otherwise provided by law, persons seeking a hearing on an agency decision which does or may determine their substantial interests shall file a petition for hearing with the agency within 21 days of receipt of written notice of the decision.

* * *

(4) Any person who receives written notice of an agency decision and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters. This provision does not eliminate the availability of equitable tolling as a defense.

52. Section 120.569(2)(c) provides that "[u]pon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it

has been untimely filed." (Emphasis added). The Commission presumably performed its duty under that section, and determined that grounds did not exist to dismiss the petition.

53. Based on the foregoing, it is concluded that the petition was timely filed.

Standing

54. The person asserting party status has the burden of demonstrating the requisite standing to initiate and maintain this proceeding. Palm Beach Cnty. Env'tl. Coal. v. Fla. Dep't of Env'tl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); Agrico Chem. Co. v. Dep't of Env'tl. Reg., 406 So. 2d 478, 482 (Fla. 2nd DCA 1981).

Marco River Marina/Rose Marina

55. Section 120.569(1) provides, in pertinent part, that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency." Rose Marina is a "[s]pecifically named person[]" whose substantial interests are being determined in the proceeding" and is, thus, a party as defined in section 120.52(13)(a). See Maverick Media Group v. Dep't of Transp., 791 So. 2d 491 (Fla. 1st DCA 2001).

Petitioner

56. Petitioner's standing is gauged by the two-pronged test for standing in formal administrative proceedings first

established in the seminal case of Agrico Chemical Corporation v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the Court held that:

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482.

57. Agrico was not intended as a barrier to the participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. Rather, "[t]he intent of Agrico was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings." Mid-Chattahoochee River Users v. Fla. Dep't of Env'tl. Prot., 948 So. 2d 794, 797 (Fla. 1st DCA 2006) (citing Gregory v. Indian River Cnty., 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

58. The effect of the permitted activity on Petitioner's interest in ensuring that tourists continue to visit Marco Island, and thereby sustain her livelihood as a bartender, is not a substantial injury in fact which is of a type or nature

that the Commission's regulatory permitting authority regarding the "take" of a species of special concern is designed to protect. Thus, Petitioner failed to prove that she has standing.

59. In the event the foregoing analysis of Petitioner's standing is determined to be incorrect, a review of the merits of the issuance of the Permit is provided to ensure a complete record for review.

Burden of Proof

60. As the party seeking issuance, Rose Marina bears the burden of demonstrating, by a preponderance of the evidence, entitlement to the Permit. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat.

61. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833 (Fla. 1993); Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Env'tl. Reg., 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

Standards

62. Article IV, section 9 of the Florida Constitution provides, in pertinent part, that "[t]here shall be a fish and

wildlife conservation commission, [which] shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life."

63. Section 379.1025, Florida Statutes, provides that:

The Fish and Wildlife Conservation Commission may exercise the powers, duties, and authority granted by s. 9, Art. IV of the Constitution of Florida, and as otherwise authorized by the Legislature by the adoption of rules, regulations, and orders in accordance with chapter 120.

64. In furtherance of its constitutional and statutory authority, the Commission has promulgated Florida Administrative Code Chapter 68A-27 relating to species of special concern and the circumstances under which they may be subject to a "take."

65. Rule 68A-27.005 provides, in pertinent part, that:

(2) The following species are hereby declared to be of special concern, and shall be afforded the protective provisions specified.

(a) No person shall take, possess, transport, or sell any species of special concern included in this subsection or parts thereof or their nests or eggs except as authorized by permit from the executive director, permits being issued upon reasonable conclusion that the permitted activity will not be detrimental to the survival potential of the species. For purposes of this section, the definition of the word take in Rule 68A-1.004, F.A.C., applies.

* * *

(e) Birds:

* * *

4. Burrowing owl (*Athene cunicularia*).

66. Rule 68A-1.004 defines "take" as:

taking, attempting to take, pursuing, hunting, molesting, capturing, or killing any wildlife or freshwater fish, or their nests or eggs by any means whether or not such actions result in obtaining possession of such wildlife or freshwater fish or their nests or eggs.

67. The evidence in this case demonstrates that, applying the factors set forth in rule 68A-27.005, the permitted activity will not be detrimental to the survival potential of the burrowing owl species.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law set forth herein, it is RECOMMENDED that the Florida Fish and Wildlife Conservation Commission enter a final order approving the issuance of Permit No. LSNR-15-00004 to Respondent, Marco River Marina/Rose Marina.

DONE AND ENTERED this 16th day of October, 2015, in
Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of October, 2015.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.