BEFORE THE ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH COUNTY

In re: CARMEN SMITH BARKETT
Application for Waiver. **Case No. 11-EPC-012**

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FINAL ORDER ON APPLICATION FOR WAIVER OF PROVISION IN SECTION 1-11.11(1)(b)(ii), RULES OF THE ENVIRONMENTAL PROTECTION COMMISSION

BACKGROUND

On November 18, 2011, the applicant Carmen Smith Barkett (hereinafter "the Applicant") submitted a waiver request to the Environmental Protection Commission of Hillsborough County (EPC) pursuant to Section 1-2.50, Rules of the EPC. The Applicant requested a waiver of Section 1-11.11(1)(b)(ii), Rules of the EPC. This rule provides the following exemption:

> [T]he following activities in wetlands and other surface waters shall be exempt from the application of Chapter 1-11 provided the activity is reviewed and approved by other appropriate agencies as necessary. (ii) Development within *wholly owned* artificially created wetlands or other wholly owned surface waters less than one (1) acre in surface area . . . which were constructed entirely in historic uplands. (emphasis added)

Within the Applicant's property boundary is a jurisdictional surface water that has been determined to be an artificially created surface water with a wetland component along its edge. The entire area of the surface water is less than one tenth (1/10) acre in surface area. The surface water, however, extends into the property of an adjacent property owner. The Applicant now seeks a waiver from the EPC Wetland Rule exemption requirement that the artificially created surface water must be "wholly owned" by the Applicant. In addition, the Applicant's waiver request seeks authorization to fill in the area without further EPC review. The Applicant requests a waiver of the above rule section for a proposed wetland and other surface water impact based on an alleged substantial hardship as identified in Section 1-2.50, Rules of the EPC and based on their assertion that the underlying purpose of the "wholly owned" rule requirement is still met.

FINDINGS OF FACT

1. The Applicant's property is located at 909 Oak Hollow Place, Brandon in Hillsborough County, Florida.

2. Within the Applicant's property is a jurisdictional surface water regulated pursuant to the EPC Wetland Rule Chapter 1-11, Rules of the EPC. The surface water extends over and onto the adjoining property and is not wholly owned by the Applicant. The total area of the surface water is less than one tenth (1/10) acre and is characterized as a small "pond" with a small wetland fringe along the boundary. The EPC records indicate that the surface water was artificially created or, at least, is not located on historically wetland soils.

3. A concrete wall was constructed across the pond pursuant to an EPC Executive Director "Miscellaneous Activities in Wetlands" impact authorization under Section 1-11.10, Rules of the EPC. The wall crosses the entire pond at approximately six inches from the property line of the adjacent property owned by Anthony Ekonomou and Diana Ekonomou (collectively referred to as "the adjoining property owners") located at 907 Oak Hollow Place, Brandon in Hillsborough County, Florida. The pond extends an estimated 80 feet along the property boundary and approximately only three to five feet of surface water extends into the adjacent property owned by the adjoining property owners.

4. The Applicant seeks a waiver to eliminate the requirement that the surface water be "wholly owned" to qualify for an exemption in Section 1-11.11(1)(b)(ii), Rules of the EPC.

5. The EPC received the waiver application on or around November 18, 2011, from the Applicant and subsequently received a supplement to the waiver request on March 9, 2012. The Applicant requested a waiver of Section 1-11.11(1)(b)(ii), Rules of the EPC. This rule requires that an artificial surface water less than one acre in size be wholly owned to qualify for an exemption from the Wetland Rule.

6. Pursuant to section 1-2.50(3), Rules of the EPC, the Applicant published notice of the waiver application and the March 22, 2012 public hearing in the Tampa Tribune on Monday March 12, 2012. The public hearing was opened in March 22, 2012 and continued to April 19, 2012.

7. Pursuant to Section 1-2.50(4), the Commissioners considered the application, the Executive Director's recommendation, and the comments of the public at the regular meetings of the EPC on March 22, 2012 and April 19, 2012.

8. The Applicant stated, in part, that she qualifies for the waiver request because the topography in the area has been modified by the adjoining property owners. In addition, the Applicant asserts that the pond is severed by a concrete wall; the surface water has been previously impacted and the current rule would constitute a hardship on the Applicant as it causes a small area of stagnant water creating potential harm to humans, among other hardships set forth in the request.

9. The concrete wall was designed and permitted to ensure the hydrology of the surface water would not be adversely impacted. The concrete wall, however, has essentially severed the surface water into two separate areas.

10. In addition, the past recent unauthorized wetland impact activities of the adjoining property owners indicate that they will not be adversely affected by activities on the Applicant's property provided those activities still meet the conditions provided in the exemption rule section, specifically Rule Sections 1-11.11(2)(b),(c), (e) and (h), Rules of the EPC.

CONCLUSIONS OF LAW

11. This variance is requested pursuant to section 1-2.50, Rules of the EPC, which states as follows:

> **1-2.50 REQUEST FOR VARIANCE OR WAIVER**
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> (a) Upon application, the Executive Director may recommend to the Commission that a variance or waiver be granted from the provisions of the rules adopted pursuant to Chapter 84-446, where the applicant demonstrates:
>
> (1) A substantial hardship as defined by section 120.542, F.S., or that a violation of the principles of fairness as defined by section 120.542, F.S., would occur, and
>
> (2) The purpose of the underlying rule can be, or has been, achieved by other means, and
>
> (3) The provision from which the variance or waiver is being sought did not originate with the DEP where the variance must be considered by the DEP pursuant to section 403.201, F.S. or the variance or waiver must be considered by the DEP or the Southwest Florida Water Management District pursuant to Chapter 120, F.S. Additionally, the Commission does not process variances or waivers of state-delegated rules.
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> (b) The application must specify the rule for which the variance or waiver is requested, the type of action requested, the specific facts that would justify a variance or waiver, and the reasons why and the manner by which the purposes of the underlying rule would still be met.
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> (c) Notice of the application must be published by the applicant in a newspaper of general circulation summarizing the factual basis for the application, the date of the Commission hearing, and information regarding how interested persons can review the application and provide comment.
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> (d) The Commission will consider the application, the Executive Director's recommendation, and the comments of the

> public at a public hearing during a Commission meeting. The Commission shall grant, in whole or part, or deny the application by written decision supported by competent substantial evidence. The Commission may impose additional conditions in a variance or waiver.

12. Section 1-2.50, Rules of the EPC, requires that the applicant show that "purpose of the underlying rule can be, or has been, achieved by other means" and "a substantial hardship as defined by section 120.542, F.S., or that a violation of the principles of fairness as defined by section 120.542, F.S., would occur." While section 120.542, F.S. is not the enabling legislation for the EPC variance provision, it is persuasive and the EPC adopted the statute's definitions for hardship and fairness. Section 120.542, F.S. provides that before an agency can grant a variance, the petitioner must demonstrate that the purpose of the underlying statute will be or has been achieved by other means and that either the application of the rule would create a substantial hardship or that it would violate principles of fairness or constitute a hardship.

13. Chapter 1-11, Rule of the EPC was established to avoid and/or minimize impacts to wetlands and other surface waters and to require that the environmental benefits provided by an impacted wetland are adequately protected through mitigation. The provision in Rule Section 1-11.11(1)(b)(ii), Rules of the EPC, regarding a surface water being "wholly owned" was established so that adjacent property owners would not be adversely affected by otherwise exempt activities in the surface waters and that they could continue to use and enjoy those surface waters without impairment by activities on the neighboring property. Among other assertions, the Applicant asserts the concrete wall has severed the surface water and that allowable activities under the exemption will not adversely affect the neighboring property.

14. The Florida State Law Review, Winter 1997 (LEXSEE 24 FLA. ST. U.L. REV. 353. 361) explains the fairness exception as follows: "Fairness exceptions. These are used when application of a rule would cost one entity or person substantially more than those similarly situated, when application of a rule would unintentionally penalize an entity's or person's recent good-faith activities, or when regulatory costs to an entity or person are simply not worth the minimal social benefits that compliance with the rule would produce." The law review article explains that the variance (or waiver) provision in Chapter 120, F.S. was created to acknowledge "that an agency's means of accomplishing a statutory directive may not be the only acceptable approach." The Applicant asserts that the exemption should be applicable to their pond based on the entirety of the facts as identified in the Waiver request and the Amended Waiver request, and thus the enforcement of the "wholly owned" requirement provides "minimal social benefit" to the residents of Hillsborough County, including the adjoining property owners.

15. With the specific condition as detailed in the Order below, the Applicant has demonstrated that a substantial hardship and a violation of the principles of fairness would occur if they were not granted a waiver in this specific situation.

16. With the specific condition as detailed in the Order below, the Applicant has also demonstrated the underlying purpose of the rule will still be achieved by eliminating the "wholly owned" requirement.

17. The provision from which the waiver is being sought, Rule Section 1-11.11(1)(b)(ii), Rules of the EPC, did not originate with the DEP where the variance must be considered by the DEP pursuant to section 403.201, F.S. and that the waiver does not need to be considered by the DEP or the SWFWMD pursuant to Chapter 120, F.S.

18. These findings and conclusions are also applicable to the entire surface water and are applicable to both property owners. The following conditions to this waiver apply to the entire subject surface water and this order is enforceable under the EPC Act and rules: the Applicant and/or neighbor's activities must meet all other provisions of Section 1-11.11(1)(b) and Section 1-11.11(2)(a) – (h), Rules of the EPC.

ORDER

19. For the foregoing reasons, the requested waiver from the "wholly owned" requirement in Section 1-11.11(1)(b)(ii), Rules of the EPC is granted for the entire subject surface water. Compliance with the conditions and limitations noted within Section 1-11.11(1)(b) and Section 1-11.11(2)(a) – (h), Rules of the EPC shall still be required for any future activities constituting development under the EPC Wetland rule Section 1-11.02(2)(b) in the subject surface water.

20. No express or implied grant of authority has been provided by this Order or under any exemption, permit or other authorization for any person to enter or impact any other person's private property by any means whatsoever. It is the responsibility of the property owner or agent to ensure that any activities authorized under this Order do not constitute a trespass or encroachment onto private property of another person.

NOTICE OF RIGHTS

The EPC's proposed action on this waiver shall become final unless a timely appeal via writ of certiorari to the 13th Judicial Circuit is filed with any appropriate fee. A copy of the appeal must be provided to the EPC Legal Department, 3629 Queen Palm Dr., Tampa, Florida 33619.

DONE AND ORDERED this 19th of ~~August~~ April, 2012 in Tampa, Florida.

Kevin Beckner, Chairman

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