

**BEFORE THE ENVIRONMENTAL PROTECTION COMMISSION OF
HILLSBOROUGH COUNTY**

**In re: HILLSBOROUGH COUNTY
Application for Waiver.**

Case No. 11-EPC-003

**FINAL ORDER ON APPLICATION FOR WAIVER
OF PROVISION IN SECTION 1-11.08(6)(e), RULES OF THE
ENVIRONMENTAL PROTECTION COMMISSION**

BACKGROUND

On March 21, 2012, Hillsborough County (hereinafter "the County") submitted a waiver request to the Environmental Protection Commission of Hillsborough County (EPC) under section 1-2.50, Rules of the EPC. The County requested a waiver of section 1-11.08(6)(e), Rules of the EPC. This rule requires a permanent conservation easement over any mitigation area in excess of 0.5 acres proposed as compensation for a permitted wetland impact.

Section 1-11.08(6) states in part

Where wetlands are or may be adversely impacted by development, an acceptable mitigation plan shall include detailed plans designed to compensate for any adverse impact to the environmental benefits and shall comply with Commission rules and Rules 62-345.200-.900, F.A.C. All such mitigation must also comply with the following:

e. a recorded designation in the Official Records of Hillsborough County as a permanent conservation easement as defined in section 704.06, F.S., whenever the mitigation area(s) alone or cumulatively exceed 0.5 acres.

The County requests a waiver of the above rule section for its proposed wetland impact based on the principles of fairness.

FINDINGS OF FACT

1. The County's wetland impacts are for a bridge replacement on the Little Manatee River located in Hillsborough County, Florida. The proposed mitigation was located on a portion of a property that was acquired through a cooperative effort between the County in conjunction with the Environmental Lands Acquisition and Protection Program (ELAPP) and the Southwest Florida Water Management District (District). This property is subject to an Interlocal Agreement that provides the County with the right of first refusal at half of the market value and is currently leased to the County for management under a Lease Agreement, as amended by a First Amendment, until July 30, 2026.

2. In accordance with Chapter 1-11, Rules of the EPC, the County filed an application for a bridge replacement on the Little Manatee River. As part of the requirements

to obtain a wetland permit, the County proposed mitigation to offset adverse impacts to wetlands. Chapter 1-11 requires any mitigation in excess of 0.5 acres to be protected by a conservation easement in order to permanently protect the mitigation area.

3. The EPC received the waiver application on March 21, 2012, from the County. The County requested a waiver of section 1-11.08(6)(e), Rules of the EPC. This rule requires a permanent conservation easement for mitigation areas which alone or cumulatively exceed 0.5 acres in size proposed to offset wetlands impacts.

4. Pursuant to section 1-2.50(3), Rules of the EPC, the County published notice of the waiver application and the June 28, 2012 public hearing in the Tampa Tribune on June 16, 2012.

5. Pursuant to section 1-2.50(4), Rules of the EPC, the Commissioners considered the application, the Executive Director's recommendation, and the comments of the public at a regular meeting of the EPC on June 28, 2012.

6. The County stated that it qualified for the waiver request because it will meet the underlying rule (Chapter 1-11) and that a substantial hardship would occur if the rule requirement was imposed.

7. The County asserts in its application that the District property where the mitigation is located is unique from other mitigation areas subject to EPC rules in that the District property is protected as conservation land. The District is a special district of the state created by the Legislature and charged with protecting and managing the water resources within its 16-county area. The property over which a conservation easement would be granted to EPC is currently owned by the District and is managed for conservation purposes.

CONCLUSIONS OF LAW

8. 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

(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.

(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.

(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.

(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.

9. Section 1-2.50, Rules of the EPC, requires that the applicant show that the "purpose of the underlying rule can be, or has been, achieved by other means" and "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. Section 120.542(2) states, "For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule."

10. Chapter 1-11, Rules of the EPC was established to avoid and/or minimize impacts to wetlands and to require that the environmental benefits provided by an impacted wetland are adequately protected through mitigation. Among other assertions, Hillsborough County asserts that the SWFWMD is already statutorily charged in Chapter 373, F.S. with protecting lands in its ownership, thus it would be redundant and unfair to require a conservation easement over those same lands.

11. 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." Hillsborough County asserts that requiring state property, which is already designated for conservation purposes, to be further encumbered with a conservation easement is not a wise use of public resources and redundant, thus providing "minimal social benefit."

12. With the specific condition detailed below, Hillsborough County has demonstrated that a violation of the principles of fairness would occur if it was not granted a waiver in this specific situation.

13. Hillsborough County has demonstrated that the underlying purpose of the rule will be achieved.

14. Hillsborough County has demonstrated that the provision from which the 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. and that the waiver does not need to be considered by the DEP or the SWFWMD pursuant to Chapter 120, F.S.

15. The following condition to this waiver applies to this subject mitigation and any other future wetland impact applicant that has mitigation occurring on SWFWMD conservation lands and this order is enforceable under the EPC Act and rules: in the event the SWFWMD ever conveys all or a portion of the aforementioned mitigation area and the area is no longer protected from development, Hillsborough County or any future applicant utilizing this waiver must then provide written notice to the EPC of the conveyance and must provide some alternative equivalent mitigation or protection which is acceptable to the EPC and equal to the mitigation or protection required by the EPC wetland permit, unless the aforementioned mitigation area is acquired by the applicant, in such event the applicant shall provide the required conservation easement.

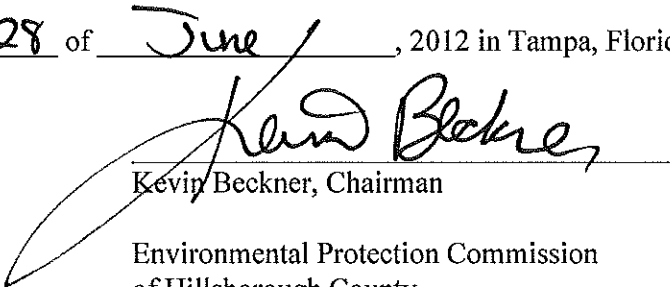
ORDER

16. For the foregoing reasons, the requested waiver from sections 1-11.08(6)(e), Rules of the EPC is granted pertaining to the subject mitigation area and any future mitigation for wetland impacts occurring on SWFWMD conservation lands with the condition as noted above in paragraph 15. This waiver shall remain in effect for 15 years from the date of this Final Order.

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 28 of June, 2012 in Tampa, Florida.


Kevin Beckner, Chairman

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