

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

CITY OF BELLE ISLE, a
Florida municipal corporation,

Plaintiff,

Case No.:

v.

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,
an agency of the State of Florida,

Defendant.

COMPLAINT

The City of Belle Isle (“City”) hereby files this Complaint against the Florida Fish and Wildlife Conservation Commission (“FWC”). In support, the City states:

JURISDICTION, VENUE, AND THE PARTIES

1. This is a constitutional challenge to certain Florida Administrative Code Rules that FWC has promulgated.

2. This Court has subject matter jurisdiction as this is an action at law or in equity pursuant to sections 26.012, 86.011, and 120.73, Florida Statutes, and Article V, section 5 of the Florida Constitution, the value of which exceeds the jurisdictional limits for this Court.

3. The City is a Florida municipal corporation located in Orange County, Florida, which exercises its corporate, governmental, and proprietary powers to enable the City to conduct and perform municipal functions.

4. FWC is a Florida agency and constitutional entity created under Article IV, section 9 of the Florida Constitution, which exercises the regulatory and executive powers of the

state with respect to wild animal life and fresh water aquatic life and must establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions.

5. Venue is appropriate in Leon County, Florida, as FWC is entitled to assert its common law home venue privilege and FWC maintain its principal headquarters in Tallahassee, Leon County, Florida.

6. All conditions precedent to bring this action have occurred, have been performed by the City, or have been waived. This action has been timely filed.

GENERAL ALLEGATIONS

7. The City is located within Orange County, Florida, and is only minutes from the town center of metropolitan Orlando and Orlando International Airport. The City is 5.1 square miles with a population of approximately 6,277 with approximately 2,573.3 persons per square mile. This is a greater population density than the City of Orlando. Accordingly, the City is densely populated, heavily developed, and essentially built-out.

8. The predominant hunting activities within the City occur on and about the Conway Chain of Lakes; however, there are approximately 872 lots and parcels that front on the Conway Chain of Lakes within the City, and approximately 785 of these lots and parcels have docks that are constructed onto and into the Conway Chain of Lakes. All these lots and parcels are afforded expansive and valuable littoral rights, including but not limited to, the right to utilize the lakes, rights of view and access, rights to wharf out, and rights relating to peaceful and quiet enjoyment of the Conway Chain of Lakes.

9. Public docks/boat ramps also exist on the Conway Chain of Lakes allowing enjoyment and heavy use by both non-residents and residents of the City. In fact, there are two (2) seaplane bases located on the Conway Chain of Lakes (Lake Conway North Seaplane Base,

FAA Identifier: 91FL and Lake Conway South Seaplane Base, FAA Identifier: 0FL5). Accordingly, the tracts of land under the City's jurisdiction are not vacant or expansive tracts that one would normally associate with the taking of wild game or migratory birds. There are also countless locations within a short drive from the City's jurisdictional limits that are not so densely populated, intensely developed, or heavily utilized by the general public that would ensure peaceful and safe taking of wild game or migratory birds.

10. On or about October 16, 2017, the City formally requested that FWC establish a bird sanctuary for the protection of all birds and wildlife and establish restrictive hunting areas within the City, including but not limited to, the Conway Chain of Lakes that are in the jurisdictional limits of the City (the "Sanctuary Request"). A true and accurate copy of the Sanctuary Request is attached as Exhibit "A."

11. In essence, the Sanctuary Request sought permission from FWC for the City to establish the entirety of the approximately 5.1 square miles jurisdictional limits of the City as a bird sanctuary/restricted hunting area.

12. The Sanctuary Request outlined many of the City's concerns and public policy rationales for establishing such bird sanctuary/restricted hunting area due to public safety concerns and complaints as well as animal rights and environmental stewardship issues. *See* Exhibit "A."

13. Previous to the Sanctuary Request, on or about September 19, 2017, the City Council unanimously approved and lawfully enacted Ordinance 17-07 to establish that "all land and airway area embraced within the city limits of Belle Isle, Florida is hereby declared to be and shall hereafter be designated as a 'Bird Sanctuary.'" *See* Exhibit "A," Ordinance 17-07, § 1.

14. Additionally, Ordinance 17-07 provides:

The City Public Works Department and private property owners will post the area boundary with signs bearing the words “RESTRICTED HUNTING AREA, Hunting by Special Permit Only” or “BIRD SANCTUARY, No Hunting” established by Rule 68A-19.002, F.A.C., which shall be placed at intervals of no more than 500 feet, be easily visible from any point of ingress or egress and provide other necessary notice of such area to the public.

* * *

The Belle Isle Police Department, including the Marine Patrol, shall be responsible for enforcement of regulations of the Florida Fish and Wildlife Conservation Commission and this ordinance.

Exhibit “A,” Ordinance 17-07, § 3. A copy of Ordinance 17-07 was included in the Sanctuary Request materials.

15. The Sanctuary Request and Ordinance 17-07 were submitted to FWC in accordance with FWC codified Florida Administrative Code Rules regarding the establishment of bird sanctuaries/restricted hunting areas.

16. Such FWC codified Florida Administrative Code Rules are identified as 68A-19.002 and 68A-19.004. The rules state the following:

68A-19.002 Establishment of Restricted Hunting Areas, and Bird Sanctuaries, Procedure.

(1) The Commission may establish bird sanctuaries for the protection of all birds and other wildlife and restricted hunting areas within any developed area upon the written request of the local governmental body having jurisdiction over such areas. In requesting establishment of such restricted hunting areas or bird sanctuaries, the governing body shall, by proper resolution or ordinance, officially agree to assume the responsibility for enforcement of regulations of the Commission which apply to such areas, including posting the area boundary with signs bearing the words “RESTRICTED HUNTING AREA, Hunting by Special Permit Only” or “BIRD SANCTUARY, No Hunting” established by Rule 68A-19.002, F.A.C., which shall be placed at intervals of no more than 500 feet, be easily visible from any point of ingress or egress and provide other necessary notice of such area to the public. Said governing body shall agree to instruct its duly authorized law enforcement personnel to enforce said regulations within the area.

(2) Following receipt of the request of the governing body the Commission shall, through its staff, investigate to ensure that the tract under

consideration is sufficiently developed as to preclude recreational hunting in the interest of safety and that its closure will not result in a denial of reasonable and lawful hunting opportunity.

(3) Action by the Commission for the establishment of restricted hunting areas or bird sanctuaries as recommended by its staff shall be taken at its July and January meetings.

68A-19.004 Regulations in Bird Sanctuaries.

No person shall take any wildlife in any bird sanctuary using a gun unless such taking is authorized by specific rule relating to such sanctuary.

(emphasis in original).

17. The FWC’s rulemaking authority for the above-referenced rules is expressly set forth as Article IV, section 9 of the Florida Constitution. This constitutional provision accords the FWC exercise of the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, and the Florida Constitution requires the FWC “establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions.” *See* Art. IV, § 9, Fla. Const.

18. Florida Administrative Code Rule 68A-19.002—enacted under the FWC’s constitutional powers—is subject to challenge in this judicial forum. This process is codified and provided by FWC in the FWC’s Due Process Procedures (the “Due Process Procedures”), which are set forth in Florida Administrative Code Rule 68-1.008. In recognition of the constitutional (*see* Art. IV, § 9 Fla. Const.) and statutory requirements (*see* § 20.331(9)(a), Fla. Stat.) that the FWC establish adequate due process procedures in its exercise of the FWC’s regulatory and executive functions, Florida Administrative Code Rule 68-1.008(5)(b) and (c)1.a. provides the following:

(b) Procedural Due Process: Procedural due process, in a broad sense, encompasses the procedural requirements that must be observed in the course of a legal proceeding to ensure the protection of private rights and property. Procedural due process, in an administrative setting, consists of requirements for notice, a

meaningful opportunity to be heard and a fair, impartial decision-making authority.

* * *

(c) Substantive Due Process: Substantive due process refers to

1. The FWC rules derived from constitutional authority are not to be subject to administrative rule challenges under Section 120.56, F.S. *See, Airboat Association of Florida, Inc. v. Florida Game and Fresh Water Fish Commission*, 498 So. 2d 629 (Fla. 3rd DCA 1986). Under the APA, The FWC is not defined as an agency except when it is acting pursuant to statutory authority derived from the Legislature. *See*, Section 120.52(1)(b), F.S. However, **rules derived from constitutional authority can be challenged in a number of ways:**

a. **The FWC rules**, and possible proposed rules, **derived from constitutional authority may be challenged directly before the circuit court by declaratory action, injunctive action** or, in appropriate circumstances, under the Bert J. Harris Private Property Rights Protection Act (Section 70.001, F.S.). Decisions of the circuit court can be appealed to the appropriate District Court of Appeal, and potentially to the Supreme Court of Florida.

(emphasis added).

19. On or about January 22, 2018, the City received correspondence from Executive Director of the FWC, Eric Sutton, which copied the FWC Commissioners, and stated in part:

As you are aware, Rule 68A-19.002, Florida Administrative Code, sets forth the procedures for establishing bird sanctuaries/restricted hunting areas. Per this rule, an area under consideration must be sufficiently developed as to preclude recreational hunting in the interest of safety and that its closure will not result in a denial of reasonable and lawful hunting opportunity. Based on our staff's assessment, specifically the Conway Chain of Lakes . . . , we have found it not to be sufficiently developed as to preclude recreational hunting in the interest of safety and its closure would result in the denial of reasonable and lawful hunting opportunity. Your request is hereby denied based on this assessment.

A true and accurate copy of the correspondence is attached as Exhibit "B," and is referred to herein as the "FWC Denial."

20. Aside from the FWC Denial's conclusory determination, the FWC Denial states:

We have carefully reviewed the concerns and situation on the Conway Chain of Lakes concerning waterfowl hunting, including a site inspection in 2016 with [City Mayor Pisano], some of Belle Isle's officials and staff, several other

interested parties, and our staff. Since then, we have met several times with you and with concerned residents to discuss the issue.

See Exhibit “B.”

21. Otherwise, the City has neither been notified of nor provided any understanding of the criteria, evaluation utilized, methodology, or any quantification of what actually constitutes a situation where or FWC determination that:

(a) a municipal designated tract of land desired to be a bird sanctuary/restricted hunting area “is sufficiently developed as to preclude recreational hunting in the interest of safety”; or

(b) a closure of the municipal designated tract of land desired to be a bird sanctuary/restricted hunting area would “result in a denial of a reasonable and lawful hunting opportunity.”

See Fla. Admin. Code R. 68A-19.002(2).

22. Upon information and belief, neither FWC nor its employees conducted the investigation required under Florida Administrative Code Rule 68A-19.002(2) relating to the development, public safety, and hunting opportunity criteria set forth therein.

23. The FWC Denial fails to provide any detailed or meaningful findings of fact and does not contain any competent substantial evidentiary findings that support same. Indeed, the City was not provided notice of the FWC Denial or the FWC Commission’s consideration of the City’s Request, and the City was not afforded an opportunity to present its own evidence prior to the FWC Denial.

24. Moreover, FWC expressly requires in Florida Administrative Code Rule 68A-19.002(3) that any and all “action” must be taken “at its July and January meetings.” Upon information and belief, FWC did not comply with this provision in evaluation of the City’s Request as the City’s Request was denied based on the arbitrary and capricious determination of the FWC Executive Director and/or FWC staff—not a decision rendered by the entire FWC

Commission. Further, the FWC denial is dated January 22, 2018; however, no FWC Commission meeting was held in January while neither the December 2017 nor February 2018 FWC Commission agendas contain any reference to the City's Request. *See* Exhibit "B."

25. In other terms, the FWC Denial was made in a manner that ignores the criteria and processes set forth in Florida Administrative Code Rule 68A-19.002(2)-(3), and, to the extent any criteria or processes were followed, the FWC Denial was based upon arbitrary and capricious application of Florida Administrative Code Rule 68A-19.002(2).

26. It is axiomatic that Florida agencies must not act with unbridled or unfettered discretion in the enactment or application of their administrative rules. In *Barrow v. Holland*, 125 So. 2d 749 (Fla. 1960), the Florida Supreme Court analyzed a permit rule enacted by the Game and Fresh Water Fish Commission of Florida. The court observed the established Florida law that:

Even granting the Commission the power to require a permit for the display of Florida wildlife on exhibit, the quoted rule falls far short of meeting constitutional requirements that it establish standards for the guidance of those members of the public who are affected by it, as well as to govern the agents of the Commission who are required to enforce. . . . It is a well-established rule of constitutional law that an enactment delegating administrative power to an agency of government should define the limits of the power by including in the enactment reasonable standards which enable the affected public to meet the requirements of the enactment. These standards at the same time preclude the exercise of arbitrary power by the enforcement agencies of the government. . . .

An agency of the government having the power to regulate is not permitted to arrogate to itself or to delegate to its employees the arbitrary power to determine private rights with an unbridled discretion.

Id. at 752 (citations omitted); *see also Lewis v. Fla. State Bd. of Health*, 143 So. 2d 867, 869 (Fla. 1st DCA 1962) (providing analysis of the *Barrow* decision).

27. Additionally, administrative rules are subject to vagueness challenges where they are subject to inconsistent application or "require the performance of an act in terms that are so

vague that persons of common intelligence must guess at its meaning and differ as to its application.” *See State v. Peter R. Brown Constr., Inc.*, 108 So. 3d 723, 728 (Fla. 1st DCA 2013). Apposite here are licensure or permitting decisions invalidated on vagueness grounds due to the significant risk of capricious, whimsical, and arbitrary selections. *See, e.g., Harrington & Co., Inc. v. Tampa Port Auth.*, 358 So. 2d 168, 169-70 (Fla. 1978) (no clear and specific guidelines to ensure that those licensed to perform such functions were not arbitrarily selected); *see also Effe, Inc. v. Ocala*, 438 So. 2d 506, 509 (Fla. 5th DCA 1983) (“The granting or withholding of a permit to engage in a legitimate business should not depend on the whim or caprice of the permitting authority.”).

28. Moreover, the Florida legislature has recognized a fundamental right to hunt and fish in Florida. Section 379.104, Florida Statutes, contains recognition that “hunting, fishing, and the taking of game are a valued part of the cultural heritage of Florida and should be forever preserved for Floridians.” However, the general right to hunt, fish, and take game is “subject to the regulations and restrictions prescribed by general law and by s. 9, Art. IV of the State Constitution.” Accordingly, Florida Administrative Rule 68A-19.002 and its application and enactment touches upon issues of fundamental rights of Florida citizens and the expansive home rule powers of Florida municipalities.

29. As mentioned above, Florida Rule of Administrative Procedure 68A-19.002(2) provides the criteria FWC utilizes for its decision on a bird sanctuary/restricted hunting area. The FWC Commission, through its staff, makes a two-pronged inquiry: 1) whether the tract under consideration is sufficiently developed as to preclude recreational hunting in the interest of safety; and 2) whether the closure of such tract under consideration would not result in a denial of reasonable and lawful hunting opportunity.

30. As to the first prong, the term “sufficiently developed as to preclude recreational hunting” is vague, ambiguous, undefined, and susceptible to arbitrary and whimsical determination. Apposite is *U.S. ex rel. Crenshaw v. Degayner*, 622 F.Supp.2d 1258, slip op. at **39 (M.D. Fla. 2008), where the court examined a loan agreement requiring approval from a “sufficient majority” of homeowners. The court found the term “sufficient” to be vague and left undefined while the utilization of the adjective “‘sufficient’ implies that the ‘majority’ obtained must satisfy some other applicable requirement such as the community bylaws or state law.” *Id.*

31. Here, use of the term “sufficiently developed” is vague, provides no guidelines or standards, and is subject to the whims and fancies of the FWC and its investigatory staff. The City continues to search for what other criteria, standard, or proof it must present given the fact that the City is intensely developed. There are significant public safety issues and concerns relating to the taking of game and the hunting of migratory birds on lakes within the City’s jurisdictional limits given the intense use and development of the entirety of the City as referenced herein.

32. The second prong is also susceptible to the same constitutional infirmities. The term “reasonable and lawful hunting opportunity” is vague, ambiguous, undefined, and susceptible to arbitrary and whimsical determination. This language is analogous to the court’s reversal of a summary judgment entered in favor of a city based upon the posited violation of an ordinance prohibiting loitering in a high drug activity area and, upon questioning by police, the target could not “give a lawful and reasonable explanation for his presence there.” *Crews v. City of Chester*, 35 A.3d 1267, 1273-74 (Pa. Commw. Ct. 2012). The *Crews* court held that such ordinance “offers no guidance as to what constitutes ‘a lawful and reasonable explanation,’” and

the ordinance “affords too much discretion to the police and too little notice to citizens who wish to use the public streets.” *Id.* at 1273.

33. The above-referenced lack of meaningful and predictable standards also results in impermissible unbridled or unfettered discretion in the FWC’s determination as to bird sanctuaries/restricted hunting areas. Determinations relating to “sufficient development” and “reasonable and lawful opportunity” inherently ensure that applicants under the rule are unable to determine their legal rights or duties, and the standards are subject to unequal application and differential treatment. This the Florida Constitution and prevailing Florida law do not allow.

34. Indeed, the two-pronged inquiry does not provide any weight or any objective criteria other than the caprice of the FWC—particular decisions of the FWC are left to the discretion of the FWC on a case by case and unequal basis.

35. Established Florida law also provides that a Florida agency, “[w]ithout question, . . . must follow its own rules.” *Cleveland Clinic Fla. Hosp. v. Agency for Health Care Admin.*, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996); *see also Boca Raton Artificial Kidney Ctr. v. Dep’t of Health & Rehab. Servs.*, 439 So. 2d 1055, 1057 (Fla. 1st DCA 1986) (finding impractical agency rules may be amended pursuant to established rulemaking procedures, but absent such an amendment, expedience cannot be permitted to dictate the application of the rules).

36. FWC’s failure to follow its own procedures as outlined in Florida Administrative Code Rule 68A-19.002(2)-(3) results in arbitrary and capricious application of the rule to the City’s Request and particularized circumstances, and this neglect also implicates due process concerns. *See, e.g., L.P.M. v. Sch. Bd. of Seminole County*, 753 So. 2d 130, 133 (Fla. 5th DCA 2000) (finding that due process is accorded only where adopted investigatory procedures were “substantially complied with”).

Count I – Declaratory Judgment

37. The City re-alleges paragraphs one (1) through thirty-six (36) as though fully set forth herein.

38. Pursuant to section 86.011, Florida Statutes, this Court may render declaratory judgments on the existence of any privilege or right or of any fact upon which the existence of any privilege or right may depend.

39. FWC and the City have competing interpretations regarding the application, lawfulness, and constitutionality of Florida Administrative Code Rule 68A-19.002, which includes but is not limited to the constitutional infirmities and deficiencies set forth herein.

40. There is a *bona fide*, actual, present and practical need for a declaration as the City is in doubt about whether Florida Administrative Code Rule 68A-19.002 is valid and sustainable pursuant to Florida law as it contravenes established and controlling Florida law relating to unbridled discretion, indefiniteness/vagueness, and unlawful delegation of legislative authority.

41. The declaration sought herein concerns a present, ascertained, or ascertainable state of facts or present controversy as to a state of facts.

42. The rights, obligations, privileges, or powers of the City that may be conferred by Florida Administrative Code Rule 68A-19.002 are dependent upon the facts or the law applicable to the facts as set forth herein.

43. The antagonistic and adverse interests relating to this proceeding are all before this Court by proper process.

44. The relief sought herein is not merely the giving of legal advice or the answer to questions propounded for curiosity.

WHEREFORE, the City of Belle Isle respectfully requests this Court issue a declaratory judgment finding and declaring: that Florida Administrative Code Rule 68A-19.002 is an unlawful delegation of legislative authority, unlawfully vests unbridled discretion in the FWC and its employees, is unconstitutional for indefiniteness and vagueness, is unconstitutional due to FWC's arbitrary and capricious application of such rule to the City's Request, and is unenforceable; or, alternatively, that FWC violated principles of due process and fundamental fairness in failing to substantially comply with the provisions of Florida Administrative Code Rule 68A-19.002; that the City of Belle Isle is entitled to approval of its request for a bird sanctuary/restricted hunting area; and that the City is entitled to such other and further relief as is equitable and just.

Count II – Permanent Injunction

45. Plaintiffs re-allege paragraphs one (1) through thirty-six (36) as though fully set forth herein.

46. The City has a substantial likelihood of success on the merits as Florida Administrative Code Rule 68A-19.002 is an unlawful and unconstitutional delegation of legislative authority, vests unbridled discretion in the FWC and its employees, and is otherwise unlawful as unconstitutionally vague and indefinite.

47. Alternatively, the City has a substantial likelihood of success on the merits as the FWC failed to comply or substantially comply with the procedures set forth in Florida Administrative Code Rule 68A-19.002 in violation of the City's due process rights and fundamental fairness.

48. The City will suffer irreparable harm absent the entry of an injunction to prevent the enforcement of and application of Florida Administrative Code Rule 68A-19.002. The

injuries and public safety and welfare concerns that has or will be suffered by the City and its residents and guests cannot be adequately compensated by a monetary award or money damages.

49. As set forth herein, the City has clear legal rights to the injunctive relief sought herein pursuant to established Florida law regarding vagueness, unbridled discretion, and unconstitutional delegations of legislative authority.

50. The City has no other adequate legal remedy to challenge Florida Administrative Code Rule 68A-19.002 or the unlawful criteria contained therein. Moreover, there is no plain, certain, prompt, speedy, sufficient, complete, practical, and efficient means for the City to attain the ends of justice in this matter short of this Court's issuance of an injunction. The City's damages and injuries are estimable only by conjecture and not by any accurate standard.

51. The injunctive relief sought will serve the public interest by ensuring fair opportunities for the City and its residents and guests to enjoy their littoral rights and safety while also ensuring the health and well-being of migratory birds and other fauna that seek refuge in the City's jurisdiction.

WHEREFORE, the City of Belle Isle respectfully requests this Court: hold a *de novo* trial on this matter and find that the Florida Fish and Wildlife Conservation Commission be permanently enjoined from enforcement of Florida Administrative Code Rule 68A-19.002; find that Florida Administrative Code Rule 68A-19.002 is unconstitutional and unenforceable as an unlawful delegation of legislative authority, unlawfully vests unbridled discretion in the FWC and its employees, is unconstitutional as vague and indefinite, and is unconstitutional due to FWC's arbitrary and capricious application of such rule to the City's Request; compel the FWC to approve the City's bird sanctuary/restricted hunting area request; or, alternatively, find that the FWC failed to comply or substantially comply with the processes and procedures set forth in

Florida Administrative Code Rule 68A-19.002, and require that FWC consider the City's Request in accordance with such rule; and grant such other and further relief as is equitable and just.

Respectfully submitted this ____ day of _____, 2018.

A. Kurt Ardaman
Florida Bar No.: 434094
ardaman@fishbacklaw.com
Daniel W. Langley
Florida Bar No.: 637610
dlangley@fishbacklaw.com
Christopher R. Conley
Florida Bar No.: 43589
crconley@fishbacklaw.com
Fishback, Dominick, Bennett, Ardaman,
Ahlers, Langley & Geller LLP
1947 Lee Road
Winter Park, Florida 32789
Telephone No.: (407) 262-8400
Facsimile No.: (407) 262-8402
Attorneys for Petitioner, City of Belle Isle