

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN RE:

CITY OF MIAMI BEACH, FLORIDA,

OGC Case No. 20-0148

PETITION FOR WAIVER
FROM RULE 62S-2.072(2)(b), F.A.C.,
AND RULE 62S-2.076(1), F.A.C.

ORDER GRANTING PETITION FOR WAIVER OF RULES
62S-2.072(2)(b) AND 62S-2.076(1), F.A.C.

On February 25, 2020, the City of Miami Beach ("City") filed a petition for waiver with the State of Florida Department of Environmental Protection ("Department") under §120.542, F.S. See Exhibit 1. The petition requests a waiver from the land dedication requirements contained in Rules 62S-2.072(2)(b) and 62S-2.076(1), Florida Administrative Code. The Department published notice of the petition in the Florida Administrative Register on March 6, 2020, but received no written comments in response.

FINDINGS OF FACT

1. The Department's Division of State Lands ("Division") serves as staff to the Board of Trustees of the Internal Improvement Trust Fund ("Trustees"). The Division is responsible for the administration, oversight, management, protection, and conservation of all state-owned lands.
2. The Division also has the authority to approve and administer pass-through grants from the Federal Highway Administration ("FHWA") for the development of trails under the Recreational Trails Program ("RTP") pursuant to §260.016(1)(h), F.S. The Division has the authority to adopt rules for the RTP under §260.016(1)(c) and has adopted such rules in Chapter 62S-2, Florida Administrative Code ("F.A.C.").
3. The Division manages the leases for state-owned uplands and sovereignty submerged lands. Some of these leases, generally to local governments, allow state-owned land to be used for local trails and parks.

4. Since 1982, the City has leased a parcel of state land known as the North Shore Open Space Property from the Trustees (“Lands”). The lease has been renewed several times, and currently extends through 2032. The City applied for, and received approval for, an RTP grant to develop a trail and trail facilities on the leased property.

4. As a condition of the RTP grant, the City is required to dedicate the Lands as an outdoor recreation area for the use and benefit of the general public for a minimum of 25 years.

5. The applicable portion of Rule 62S-2.072(2)(b), F.A.C., states as follows:

A site not owned by the applicant or government shall be under the applicant’s or government’s control by a 99-year lease or similar control, such that the applicant has the legal ability to dedicate and manage the site for public recreational trail use pursuant to subsections 62S-2.076(1) and (2), F.A.C.

(emphasis added).

6. The City seeks a waiver from the requirement that the site be dedicated to the general public. It would be impossible for the City to comply with Rule 62S-2.072(2)(b), F.A.C., because the City lacks “the legal ability to dedicate” the site for public recreational trail use. Only the property owner, in this case the Trustees, has the authority to dedicate the property to public use. The Division itself, although tasked with managing the property on behalf of the Trustees, has not been delegated the authority to dedicate land owned by the State of Florida.

7. The City is also requesting a waiver of the applicable portion of Rule 62S-2.076(1), F.A.C., which states as follows:

Land under control other than by ownership of the grantee such as by lease, shall be dedicated as an outdoor recreation area for the use and benefit of the general public for a minimum of twenty-five (25) years from the completion date set forth in the project completion certificate. The lease must not be revocable at will; must extend for twenty-five (25) years after project completion date; and must contain a clause which enables the grantee to dedicate the land for the twenty-five (25) year period. The dedication must be recorded in the public property records by the grantee, or in the case of a nonprofit grantee, by the land owner.

(emphasis added).

8. Neither the City nor the Division can meet the dedication requirements contained in Rule 62S-2.076(1), F.A.C. The City does not have the authority to dedicate the property, and the Division does not have the delegated authority to add this provision into its lease with the City.

CONCLUSIONS OF LAW

9. Section 120.542(2), F.S. provides that an agency should grant a variance or waiver when the person subject to a rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means and when application of the rule would create a substantial hardship or would violate principles of fairness. “Substantial hardship” is defined as a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. “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. Rule 62S-2.076(1), F.A.C., implements §260.016(1)(g), F.S., which grants the Department authority to give pass-through grants to government entities to develop trail facilities on public lands, including state-owned lands.

11. The 25-year dedication is not specifically required by statute; it is solely a rule requirement. Its purpose is to ensure that public funds are spent on public properties that will remain in the public domain for a length of time sufficient to justify the expenditure of public funds. In this case the purpose served by the required dedication can be achieved through provisions within the City’s lease that limit the City’s use of the lands to outdoor recreation for the appropriate amount of time. Under the terms of §260.016(1)(g), F.S., the Division is responsible for ensuring ensure the City’s compliance with the RTP rules and the provisions of the City’s lease with the Trustees. The Department finds that the City can achieve the purpose of the underlying statute through other means.

12. Section 120.542, F.S., specifically provides that an agency may not waive a federal requirement unless the federal program allows a waiver or the federal agency approves a waiver. Dedication is not a requirement under the federal RTP program.

13. Section 120.542(2), F.S., also requires that the petitioner for a waiver demonstrate that strict application of the rule will “create substantial hardship or would violate principles of fairness.”

14. The City has demonstrated that application of these rules would violate principles of fairness. The rule allows applicants who lease non-state-owned property to apply for RTP grants with an appropriate lease. The only difference between those applicants and the City is the City’s lack of ability to dedicate the property. As the goal of that requirement can be met through other means, it would be unfair to deny the City the ability to apply for those funds simply because of a lack of ability to dedicate the property.

15. Consequently, the Department waives the land dedication requirements contained in Rules 62S-2.072(2)(b) and 62S-2.076(1), Florida Administrative Code.

NOTICE OF RIGHTS

This action is final and effective on the date filed with the Clerk of the Department unless a petition for an administrative proceeding is timely filed pursuant to sections 120.569 and 120.57, F.S. On the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. Because the administrative hearing process is designed to formulate final agency action, the hearing process may result in a modification of the agency action or even denial of the request for a variance or waiver.

Petition for Administrative Hearing

A person whose substantial interests are affected by the Department’s action may petition for an administrative proceeding (hearing) under sections 120.569 and 120.57, F.S. Pursuant to Rule 28-106.201, F.A.C., the petition must contain the following information:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, telephone number, and any e-mail address of each petitioner or petitioner's representative, which shall be the address for service purposes during the course of the proceeding; the Department case identification number, and the county in which the subject matter or activity is located;

(c) A statement of how and when each petitioner received notice of the Department action;

(d) A statement of how each petitioner's substantial interests are affected by the Department action;

(e) A statement of the material facts disputed by the petitioner, if any. If there are none, the petition must so indicate;

(f) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the Department action;

(g) A statement of specific rules or statutes the petitioner contends require reversal or modification of the Department action, including an explanation of how the alleged facts relate to the specific rules or statutes;

(h) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wants the Department to take with respect to the Department's proposed action.

The petition must be filed (received by the Department Clerk) in the Department's Office of General Counsel, 3900 Commonwealth Boulevard, MS 35, Tallahassee, Florida, 32399-3000. Also, a copy of the petition shall be mailed to the applicant at the address indicated above at the time of filing.

Time Period for Filing a Petition:

In accordance with Rule 62-110.106(3), F.A.C., a person whose substantial interests are affected by the Department's action may also request an extension of time to file a petition for an administrative

hearing. The Department may, for good cause shown, grant the request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, before the applicable deadline for filing a petition for an administrative hearing. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

Mediation:

Mediation under section 120.573, F.S., is not available in this proceeding.

Judicial Review:

Once this decision becomes final, any party to this action has the right to seek judicial review pursuant to section 120.68, F.S., by filing a notice of appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, MS 35, Tallahassee, Florida 32399-3000; and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The notice of appeal must be filed within 30 days from the date this action is filed with the Clerk of the Department.

DONE and ORDERED this 4th day of May, 2020, in Tallahassee, Florida.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Callie
DeHaven

Digitally signed by Callie
DeHaven
Date: 2020.05.01
16:22:07 -04'00'

Callie DeHaven
Director, Division of State Lands

Filed on this date, pursuant to s. 120.52,
F.S., with the designated Department Clerk,
receipt of which is hereby acknowledged.

Lea Crandall

Digitally signed by Lea Crandall
Date: 2020.05.04 16:27:45
-04'00'

Clerk

Date

Copy furnished to:
Jimmy Morales, City Manager, City of Miami Beach

IN THE DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE OF FLORIDA

OGC No. _____

PETITION FOR WAIVER OF RULES
62S-2.072(2)(b) AND 62S-2.076(1)

The City of Miami Beach ("City") applied for and was approved for an RTP grant to develop a trail and trail facilities on the Middle Beach Recreational Corridor ("Lands") that it currently leases from the Board of Trustees of the Internal Improvement Trust Fund ("Trustees"). The City seeks a waiver of Rules 62S-2.072(2)(b) and 62S-2.076(1), Florida Administrative Code ("the Rules"), under §120.542, Florida Statutes ("F.S."), and as grounds states:

1. The Division of State Lands ("Division") serves as staff to the Board of Trustees of the Internal Improvement Trust Fund ("Trustees"). The Division is responsible for the administration, oversight, management, protection, and conservation of all state-owned lands.
2. The Division also has the authority to approve and administer pass-through grants from the Federal Highway Administration ("FHWA") for the development of trails under the Recreational Trails Program ("RTP") pursuant to §260.016(1)(h), F.S. The Division has the authority to adopt rules for the RTP under §260.016(1)(c) and has adopted such rules in Chapter 62S-2, Florida Administrative Code ("F.A.C.").

3. The Division manages the leases for state-owned uplands and sovereign submerged lands. Some of these leases, generally to local governments, allow state-owned land to be used for local trails and parks.
4. As a condition of the RTP grant, the City is required to dedicate the Lands as an outdoor recreation area for the use and benefit of the general public for a minimum of 25 years.
5. The applicable portion of Rule 62S-2.072(2)(b), states as follows:

A site not owned by the applicant or government shall be under the applicant's or government's control by a 99-year lease or similar control, such that the applicant has the legal ability to dedicate and manage the site for public recreational trail use pursuant to subsections 62S-2.076(1) and (2), F.A.C. (emphasis added).
6. The Division seeks, on behalf of the City of Miami Beach, a waiver from the requirement that the site be dedicated to the general public. It would be impossible for the City to comply with Rule 62S-2.072(2)(b) because the City lacks "the legal ability to dedicate" the site for public recreational trail use. Only the property owner, in this case the Trustees, has the authority to dedicate the property to public use. The Division itself, although tasked with managing the property on behalf of the Trustees, has not been delegated the authority to dedicate land owned by the State of Florida.
7. The Division is also requesting a waiver of the applicable portion of Rule 62S-2.076(1), F.A.C., which states as follows:

Land under control other than by ownership of the grantee such as by lease, shall be dedicated as an outdoor recreation area for the use and benefit of the general public for a minimum of twenty-five (25) years from the completion date set forth in the project completion certificate. The lease must

not be revocable at will; must extend for twenty-five (25) years after project completion date; and must contain a clause which enables the grantee to dedicate the land for the twenty-five (25) year period. The dedication must be recorded in the public property records by the grantee, or in the case of a nonprofit grantee, by the land owner.

8. The Division is seeking, on behalf of grant recipient the City of Miami Beach, a waiver of the portion of this rule that requires dedication.
9. Neither the City nor the Division can meet the requirements of Rule 62S-2.076(1), F.A.C. because neither is the land owner and neither has the authority to dedicate the property.
10. Section 260.016(1)(h), F.S., shows that the Florida Legislature intended to allow the Division to give pass through grants to local governments to develop trail facilities on public lands, presumably including state-owned lands. The Division could meet this intent by accepting the City's lease of 25 years or more on behalf of the Trustees.¹
11. The 25-year dedication is not specifically required by statute. It is solely a rule requirement. Its evident purpose is to ensure that public funds are spent on public properties that will remain in the public domain for a reasonable length of time. There is no question that the Division's lease would accomplish this purpose even without the requirement for dedication.
12. Section 120.542, F.S., provides that where "[s]trict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended

¹ If the City's lease has less than 25 years remaining on its term, the Division will seek an amendment of the lease to extend the term to the 25 years required by the RTP Rules.

results in particular instances . . . it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation.”

13. Section 120.542 specifically provides that an agency may not waive a federal requirement unless the federal program allows a waiver or the federal agency approves a waiver. Dedication is not a requirement under the federal RTP program.
14. Section 120.542(2), F.S., provides that “[v]ariations and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person.” In this case the purpose served by the required dedication can be achieved through provisions within the City’s lease that serve to limit the City’s use of the lands to outdoor recreation. Therefore, that portion of the statute is satisfied.
15. Section 120.542(2) also requires that the petitioner for a waiver demonstrate that strict application of the rule will “create substantial hardship or would violate principles of fairness.” The City has demonstrated a substantial hardship because of the RTP Rule requirement to dedicate lands they do not own. This would preclude the City from seeking grant funds that the legislature intended to be available to those leasing state-owned land.
16. Since the Division is a governmental body with the duty to provide public lands for public use, the Division will be ultimately responsible to ensure compliance with the RTP Rules requirements and the provisions of the Division’s lease with the City.

WHEREFORE, the City, respectfully requests:

That the rules referenced above waived for this project; and

Submitted this 21 day of FEBRUARY, 2020.

ATTEST:

TS

Rafael E. Granado, City Clerk

2/24/2020

Date

CITY OF MIAMI BEACH, FLORIDA

[Signature]

Jimmy L. Morales, City Manager



APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION

[Signature]
City Attorney

2/7/2020
Date