



Interoffice Memorandum

July 9, 2019

TO: Mayor Jerry L. Demings
-AND-
Board of County Commissioners

FROM: Jon V. Weiss, P.E., Director
Planning, Environmental, and Development
Services Department

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SUBJECT: July 16, 2019 – Public Hearing
Airport Parking Rental 1, LLC Conservation Area Impact Permit
#CAI-18-03-013

On March 15, 2018, the Environmental Protection Division (EPD) received an Application for a Conservation Area Impact (CAI) Permit for the Park, Bark, & Fly Airport Parking property to impact Class I and Class II wetlands in order to expand an existing parking facility. The address of the subject parcel is 6050 South Semoran Boulevard and the Parcel ID No. is 21-23-30-0000-00-007. The property is located in District 3.

The northern portion of the site currently operates as a parking facility for cars and trucks for those that are traveling to the airport or other destinations. The southern half of the site is used for storage of vehicles, boats, and recreational vehicles.

Background:

Conservation Area Determination (CAD) History:

- 1989: CAD (89-059) was issued and remains valid. This CAD designated the wetlands on the site as Class I.
- 2009: The applicant submitted a request to reclassify the wetland system north of the concrete pipes from a Class I to a Class III and the wetlands south of the existing entrance road from a Class I to a Class II. EPD denied both requests.
- 2009: The applicant requested to reclassify a small portion of the Class I wetland in the northeastern portion of the site due to some unauthorized clearing and restoration work done by the applicant. EPD agreed and reclassified a 0.23-acre portion of the wetland to a Class III.
- 2010: The applicant requested to reclassify the remaining wetlands (north and south of the entrance road) to a Class II. EPD approved the reclassification of the wetlands to the north of the road to a Class II, but denied the request to reclassify the wetland south of the road.
- 2019: The applicant requested to reclassify the wetlands south of the entrance road to a Class II. EPD denied the request.

Conservation Area Impact (CAI) History:

- 1989: The Orange County Planning Department approved 2.2 acres of Class I impacts for a roadway to access uplands in the western half of the parcel. The approved mitigation was a payment of \$155,964 to the Conservation Trust Fund. The approval of the Class I wetland impacts for a road to gain access to uplands in the western half of the parcel was determined to allow for a reasonable use of the land.
- 2006: After staff discovered there was a wetland violation, the applicant submitted an after-the-fact CAI application for impacts to 0.34 acre of Class I wetlands. This application was closed after the applicant elected to restore the unauthorized wetland impacts.
- 2007: EPD received an after-the-fact CAI application for impacts to 0.28 acre of Class I wetlands south of the existing entrance road. However, after further review, it was determined that there were no impacts to wetlands associated with the covered parking area located south of the existing entrance roadway. Therefore, the permit application was closed.
- 2009: EPD received a CAI application that proposed impacts to 24.9 acres of Class I wetlands. During review of that application, EPD determined that it could not support the request as submitted because reasonable use was already established with issuance of the original CAI permit in 1989, and there was no overriding public benefit of the project. The site plan was revised and the proposed impacts were reduced to only include impacts to 0.23 acre of Class III wetlands and the CAI permit was subsequently staff issued.

Current Request:

The applicant proposes to impact 25.05 acres of wetlands (22.28 acres of Class I, and 2.77 acres of Class II). The request also includes 3.33 acres of secondary impacts to the Class I wetland. The applicant has already cleared 5.76 acres without a permit. There is an open enforcement case for these unauthorized impacts.

The wetlands are experiencing an “edge-effect” of nuisance/exotic vegetation along the upland/wetland interface; however, the wetland interior consists of an appropriate palette of healthy, native, wetland vegetation. Although the system lacks many old-growth trees, the canopy is closed with medium-sized bay, cypress, red maple and pine. Regarding wetland hydrology, the few old-growth canopy trees that remain have exposed roots due to soil subsidence, suggesting a change in the natural hydrologic regime for this system. The applicant’s consultant states that the system has been subject to drawdown from the adjacent stormwater pond excavation associated with previous authorized development. However, there is evidence that the wetland system has “reset” to current water table levels. There were abundant contemporary hydrologic indicators including moss collars, lichen lines, adventitious roots, muck soil texture, and other indicators that all take years to re-establish following alterations to wetland hydrology. These features indicate the system has adjusted and exhibits normal parameters for wetland functionality, and will continue to do so as long as current hydrologic inputs continue in the future. Additionally, during a site visit in April 2019, EPD staff observed a wood stork (federally listed as threatened) foraging in the wetland as well as several common bird species.

Due to the presence of numerous hydrologic indicators, the quality of the vegetation, observation of imperiled wildlife species, and the size of the wetland, EPD has made the determination that this wetland is functionally significant and is of moderately-high quality.

Review Criteria in Chapter 15, Article X:

- Sec. 15-362(5) states: Where wetlands serve a significant and productive environmental function, the public health, safety and welfare require that any alteration or development affecting such lands should be so designed and regulated so as to minimize or eliminate any impact upon the beneficial environmental productivity of such lands, consistent with the development rights of property owners.
- Section 15-396(3)(a) states: The removal, alteration or encroachment within a Class I conservation area shall only be allowed in cases where no other feasible or practical alternatives exist that will permit a reasonable use of the land or where there is an overriding public benefit. The protection, preservation and continuing viability of Class I conservation areas shall be the prime objective of the basis for review of all proposed alterations, modifications or removal of these areas. When encroachment, alteration or removal of a Class I conservation area is permitted, habitat compensation as a condition of development approval shall be required.
- Section 15-396(3)(b) states: Mitigation for impacts to Class II conservation areas should be presumed to be allowed unless mitigation is contrary to the public interest.
- Section 15-419 states: The degree of impact to wetland functions, whether the impact to these functions can be mitigated, and the feasibility of cost-effective design alternatives which could avoid impact are all factors in determining whether a proposed mitigation measure will be acceptable.

The applicant provided justifications for the proposed wetland impacts that demonstrated how the proposed impacts have been minimized to the greatest extent practicable and that cost-effective design alternatives that could avoid impacts have been considered. The applicant states:

- The current parking facility is at 90% capacity on a daily basis.
- The parking facility exceeds capacity during all holidays.
- At the time of the original permit, many of the theme parks did not exist, the regional population was lower, the overall number of businesses were fewer, and changes in the area over time have created a need for additional parking.
- In regards to construction of a parking garage, an 8-acre, three level parking garage is cost-prohibitive, at average construction costs of \$60 per square foot, the total cost would be \$63,000,000.
- The parking facility provides an overriding public benefit by providing a vital product for tourists and residents that need to park vehicles near the airport for short or long term travel.
- The wetlands proposed for impact provide little wetland and wildlife function in comparison to the region's needs and the proposed mitigation.

The proposed mitigation for the wetland impacts is the preservation of 60.3 acres of forested uplands and 25.83 acres of wetlands within the Kemcho Mitigation Tract, located in Volusia County. The applicant has not demonstrated that the mitigation plan meets the requirements of Comprehensive Plan Policy C1.4.6, as the hydrologic basin where the mitigation is located is two basins removed from the basin in which the impacts occur, and there is no "spillover" benefit to the impact basin.

However, if the applicant can demonstrate the project sufficiently provides for avoidance and minimization of impacts, and is a reasonable use of the land or there is an overriding public benefit, statutory requirements (Section 373.414(1)(b), F.S.) dictate that the mitigation approved in the state Environmental Resource Permit (ERP) must be accepted by the local government. An ERP (Permit No. 20631-5) for this project was approved by the St. Johns River Water Management District on January 23, 2018. The remaining onsite wetlands are shown as “conservation easement” but the applicant’s narrative does not indicate that the wetlands will be used for any part of the proposed mitigation. In the event the Board approves this request, the mitigation is acceptable.

At EPD’s request, the Development Review Committee (DRC) provided input as to whether the current project design is appropriate and sufficiently demonstrates the minimization or elimination of wetland impacts, and either a reasonable use of the land or an overriding public benefit. At their meeting on April 24, 2019, the DRC supported EPD’s determination that the proposed plan is not a reasonable use of the land and does not provide an overriding public benefit.

Notification of the public hearing was sent on June 18, 2019 to the applicant and authorized agent. Notification of the adjacent property owners is not required.

There is an open enforcement case on the subject property. On January 31, 2018, a Notice of Violation (NOV) was sent to the property owner with the following corrective actions:

- Immediately cease all unauthorized wetland clearing;
- Install appropriate sediment/erosion control measures;
- Submit a restoration plan for the unauthorized wetland impact area; and
- Pay a penalty of \$80,750.

In response to the NOV, the property owner ceased clearing wetlands and submitted a CAI permit application in an attempt to permit the unauthorized impacts. To date, EPD has not received the penalty payment and no sediment/erosion controls were observed during the site inspection on April 17, 2019.

Staff Recommendation

Based on the documentation and justifications provided, the applicant has not:

1. Demonstrated that they have met Section 15-362(5) (minimization or elimination);
2. Demonstrated that they have met Section 15-396(3)(a) (that there are no other feasible or practical alternatives exist that will permit a reasonable use of the land or that there is an overriding public benefit).
3. Demonstrated that they meet Section 15-396(3)(b) (mitigation for impacts to Class II conservation areas should be presumed to be allowed unless mitigation is contrary to the public interest) and Section 15-419 (appropriateness of the proposed mitigation for impacts to conservation areas) because they did not meet the requirements above.

Therefore, EPD is recommending denial of the CAI and that restoration of the unauthorized wetland impacts be required.

ACTION REQUESTED: Denial of Conservation Area Impact Permit CAI-18-03-013 for Airport Parking Rental 1, LLC and require restoration of the unauthorized 5.76 acres of wetland impacts within 60 days of the decision of the Board. District 3

However, in the event the Board approves this request, the following conditions of approval are recommended:

Specific Conditions

1. This permit shall become final and effective upon expiration of the 30 calendar day period following the date of rendition of the Board of County Commissioners' (Board) decision approving the permit, unless a petition for writ of certiorari or other legal challenge has been filed within this timeframe. Any timely filed petition or other challenge shall stay the effective date of this permit until the petition or other challenge is resolved in favor of the Board's decision.
2. The operational phase of this permit is effective upon completion of construction and continues in perpetuity.
3. The wetland impacts must be completed in accordance with the 'Wetland Impact Plan' prepared by Dave Schmitt Engineering, Inc., received by the Environmental Protection Division (EPD) on December 21, 2018 and 'Figure 6a' prepared by Bio-Tech Consulting, Inc., received by EPD on December 21, 2018. Construction shall be completed within five years from issuance of this permit unless extended in writing. Requests for permit extension must be submitted to EPD prior to the expiration date.
4. The mitigation plan must be implemented in accordance with Figure 6, Figure 7, Figure 8a, and Figure 8b received by EPD on May 14, 2018. The preservation area should include 86.13 acres within the Kemcho Mitigation Tract.
5. The remaining onsite conservation areas shall be clearly marked with signage. These signs shall be installed along the upland buffer or wetland edges (as applicable) every 150 feet and be installed prior to the approval of the mass grading plans.
6. Prior to beginning construction, the permittee must demarcate the boundaries of all wetland and upland conservation areas with six foot high PVC poles with orange flagging tied to the tops or orange safety fencing. Initial clearing shall include a path along the limit of construction to facilitate installation of silt fence and form a visual limit of clearing. After the initial clearing adjacent to the conservation areas is complete, a silt fence must be installed all along the conservation easement boundaries and maintained throughout construction.
7. Prior to EPD approval of any mass grading plans that depict wetland impacts that require mitigation, this permit requires the recording of a conservation easement (CE) in the public records of Orange County, and when applicable, notation of the CE on the corresponding plat. The CE shall be dedicated to Orange County and cannot be recorded unless and until the CE is accepted and approved by the Board. The CE shall include restrictions on the real property pursuant to the requirements set forth below:
 - a. Within 30 days of issuance of this permit, the permit holder shall provide to EPD for review and written approval a copy of the surveyor's sketch and legal description of the area to be encumbered by the CE pursuant to the County-approved mitigation plan. The Orange County Surveyor must approve the sketch of description and legal description. The permit holder shall ensure that the CE identifies and is executed by the correct grantor who must hold sufficient record title to the land encumbered by the CE. Accordingly, when the permit holder submits the surveyor's sketch and legal description, the permit holder shall contemporaneously submit current evidence of title of the proposed easement area to EPD. The evidence of title is subject to review and approval by the Orange County Real Estate Management Division (REM).
 - b. The CE shall be in a form approved by the Orange County Attorney's Office (OCAO), and REM, and provided to the permittees. Pursuant to Section 704.06, Florida Statutes (FS), the CE shall prohibit all construction, including clearing,

dredging, or filling, except that which this permit specifically authorizes. The CE shall contain the provisions set forth in Section 704.06(1)(a) through (h), FS. The CE shall contain provisions that grant the County the right to access and inspect the CE area, and to enforce the terms and conditions of the CE. Unless specifically prohibited by law, the CE shall include a provision whereby the permit holder shall warrant title and agree to defend the same. The Grantor shall not amend the CE without approval by the Board.

- c. If the grantor of the CE is a partnership, the partnership shall provide to EPD a partnership affidavit stating that the person executing the CE has the legal authority to convey an interest in the partnership land.
 - d. If any mortgages exist on the land, the permit holder shall also have each mortgagee execute a consent and joinder of mortgagee subordinating the mortgage to the CE which shall be subject to review and approval of the OCAO and REM. The consent and joinder of mortgagee shall be recorded simultaneously with the CE in the public records of Orange County at the permit holder's sole expense.
 - e. Upon approval of the final executed documents by Orange County, the CE shall be scheduled to be heard by the Board. Upon approval by the Board, the easement and its attachments shall be recorded in the public records of Orange County, at the permit holder's sole expense.
 - f. If during the review of the submitted evidence of title, REM finds any encumbrances or irregularities that will render the proposed mitigation as not adequately offsetting the impact(s); the applicant shall submit a revised mitigation plan for staff review and approval. The approval may also require Board approval.
8. Prior to any filling within the 100-year flood zone a Flood Plain Permit may be required from the Orange County Stormwater Management Division authorizing the fill.
 9. The permittee shall notify EPD, in writing, within 30 days of any sale, conveyance, or other transfer of ownership or control of the real property subject to this permit. The permittee shall remain liable for all permit conditions and corrective actions that may be required as a result of any permit violations which occur prior to the transfer of the permit by Orange County to a subsequent owner. If applicable, no permit shall be transferred unless and until adequate financial assurance has been provided and approved by Orange County.
 10. For projects which disturb one acre or more of land, or which are less than one acre but are part of a larger common plan of development of sale that is greater than one acre, coverage under a National Pollutant Discharge Elimination System (NPDES) Construction Generic Permit (CGP) is required. Prior to the start of land disturbing activities, which includes demolition, earthwork and/or construction, the operator shall prepare a Stormwater Pollution Prevention Plan (SWPPP) and submit to the Florida Department of Environmental Protection (FDEP) a Notice of Intent (NOI) to obtain coverage under the NPDES Generic Permit for Stormwater Discharge from Large and Small Construction Activities (CGP) pursuant to the requirements of 62-621.300(4)(a) Florida Administrative Code (F.A.C.). As the Operator of the MS4, a copy of the NOI shall also be submitted to the Orange County NPDES Environmental Program Supervisor prior to the start of activities. Copies of the SWPPP, NOI, and FDEP Acknowledgement Letter are to be kept on the project site and made available upon request. Upon completion of all land disturbing activities and after final stabilization of the site is complete, the developer/contractor shall submit to FDEP a Notice of Termination (NOT) to end their coverage under the CGP and provide a copy of the NOT to the Operator(s) of the MS4. A copy of the CGP, NOI and additional information can be found on the FDEP website: <http://dep.state.fl.us/water/stormwater/npdes/construction3.htm>.

11. Turbidity and sediment shall be controlled to prevent off-site, unpermitted impacts and violations of water quality standards pursuant to Rules 62-302.500, 62-302.530, and 62-4.242 F.A.C. Best Management Practices (BMPs), as specified in the State of Florida Erosion and Sediment Control Designer and Reviewer Manual (2013, or most current version), shall be installed and maintained at all locations where there is the possibility of transferring sediment, turbidity, or other pollutants, into wetlands and/or surface waters due to the permitted activities. BMPs are performance based, if selected BMPs are ineffective or if site-specific conditions require additional measures, then the permittee shall implement additional or alternative measures as necessary to prevent adverse impacts to wetlands and/or surface waters. Turbidity discharging from a site must not exceed 29 NTU over background for Class III waters and their tributaries or 0 NTU over background for those surface waters and tributaries designated as Outstanding Florida Waters. A copy of the Designer and Reviewer Manual can be found at the following website: <https://www.flrules.org/Gateway/reference.asp?No=Ref-04227>.
12. Discharge of groundwater from dewatering operations requires approval from FDEP and the applicable Water Management District. The operator/contractor shall obtain an FDEP Generic Permit for the Discharge of Ground Water from Dewatering Operations pursuant to the requirements of 62-621.300(2)(a) and 62-620 F.A.C. and Florida Statutes Chapter 403. Discharges directed to the County's MS4 require an Orange County Right-of-Way Utilization Permit for Dewatering prior to the start of any discharges.

General Conditions

13. Subject to the terms and conditions herein, the permittee is hereby authorized to perform or cause to be performed, the impacts shown on the application and approved drawings, plans, and other documents attached hereto or on file with EPD. The permittee binds itself and its successors to comply with the provisions and conditions of this permit. If EPD determines at any time that activities, including without limitation the performance of the required mitigation, are not in accordance with the conditions of the permit, work shall cease and the permit may be revoked immediately by the Environmental Protection Officer. Notice of the revocation shall be provided to the permit holder promptly thereafter.
14. Prior to construction, the permittee shall clearly designate the limits of construction on-site. The permittee shall advise the contractor that any work outside the limits of construction, including clearing, may be a violation of this permit.
15. Construction plans shall be submitted to EPD prior to initiating any construction activities for review and approval. The construction plans shall include, but are not limited to, a site plan clearly depicting the location and acreage of the impacts and preservation.
16. The permittee shall require the contractor to maintain a copy of this permit, complete with all approved drawings, plans, conditions, attachments, exhibits, and modifications in good condition at the construction site. The permittee shall require the contractor to review the permit prior to commencement of the activity authorized by this permit. The complete permit shall be available upon request by Orange County staff.
17. This permit does not release the permittee from complying with all other federal, state, and local laws, ordinances, rules and regulations. Specifically, this permit does not eliminate the necessity to obtain any required federal, state, local and special district authorizations prior to the start of any activity approved by this permit. This permit does

not convey to the permittee or create in the permittee any property right, or any interest in real property, nor does it authorize any entrance upon or activities upon property which is not owned or controlled by the permittee, or convey any rights or privileges other than those specified in the permit and Chapter 15, Article X of the Orange County Code. If these permit conditions conflict with those of any other regulatory agency the permittee shall comply with the most stringent conditions. The permittee shall immediately notify EPD of any conflict between the conditions of this permit and any other permit or approval.

18. Should any other regulatory agency require changes to the property, permitted activities, or approved mitigation, the permittee shall provide written notification to EPD of the change prior to implementation so that a determination can be made whether a permit modification is required.
19. EPD shall have final construction plan approval to ensure that no modification has been made during the construction plan process.
20. The permittee shall immediately notify EPD in writing of any previously submitted information that is later discovered to be inaccurate.
21. EPD staff, with proper identification, shall have permission to enter the site at any reasonable time to ensure conformity with the plans and specifications approved by the permit.
22. The permittee shall hold and save the County harmless from any and all damages, claims or liabilities, which may arise by reason of the activities authorized by the permit.
23. All costs, including attorney's fees, incurred by the County in enforcing the terms and conditions of this permit shall be required to be paid by the permittee.
24. The permittee agrees that any dispute arising from matters relating to this permit shall be governed by the laws of Florida, and initiated only in Orange County.
25. Pursuant to Section 125.022, FS, issuance of this development permit by the County does not in any way create any rights on the part of the applicant to obtain a permit from a state or federal agency and does not create any liability on the part of the County for issuance of the permit if the applicant fails to obtain requisite approvals or fulfill the obligations imposed by a state or federal agency or undertakes actions that result in a violation of state or federal law.
26. Pursuant to Section 125.022, FS, the applicant shall obtain all other applicable state or federal permits before commencement of development.

JVW/DDJ: mg

Attachments