

Petitioners set forth two grounds for the invalidation of the permit: first, that the Committee improperly granted the permit without requiring the Applicant to submit a “needs assessment,” in violation of Ga. Comp. R. & Regs. r. 391-2-3-.03(6)(c); and second, that the Committee’s failure to require a needs assessment rendered the permit an illegal gratuity under Article III, Section VI, Paragraph VI of the Georgia Constitution.

On July 18, 2012, the Committee moved to dismiss the Petition,³ while the Petitioners moved concurrently for summary determination as to Count I. On September 28, 2012,⁴ each party responded in opposition to the other’s motion. Reply briefs were filed on October 5, 2012. Thereafter, on November 8, 2012, the parties presented oral argument on the pending motions.⁵

After careful consideration of the parties’ motions and arguments and for the reasons set forth below, the Committee’s Motion to Dismiss is **DENIED**. The Petitioners’ Motion for Summary Determination is **GRANTED**, and the Committee’s decision to issue the permit is **REVERSED**.

II. STATUTORY AND REGULATORY FRAMEWORK

The CMPA expressly recognizes that Georgia’s coastal marshlands are a valued recreational and commercial resource, as well as “a vital natural resource system” that is “among the richest providers of nutrients [for marine life and wildlife] in the world.” O.C.G.A. § 12-5-281. The marshlands “provide a nursery for commercially and recreationally important species of shellfish and other wildlife, provide a great buffer against flooding and erosion, and help

³ The Committee filed a non-substantive amendment to its Motion on July 20, 2012.

⁴ At the parties’ joint request, the deadline for responsive pleadings was twice extended to allow time for settlement negotiations. The negotiations were ultimately unsuccessful.

⁵ On the date of the oral argument, the Applicant filed a Motion to Intervene, which is denied as moot in light of the ruling herein.

control and disseminate pollutants.” Id. The CMPA’s purpose is to manage and preserve the marshlands for present and future generations. Id.

To facilitate this mission, the CMPA regulates marshland development by requiring the issuance of a permit before certain marsh-disturbing activities may take place. Pursuant to O.C.G.A. § 12-5-286(a), “No person shall remove, fill, dredge, drain, or otherwise alter any marshlands or construct or locate any structure on or over marshlands in this state within the estuarine area thereof without first obtaining a permit from the committee” The Applicant in this case proposes to build a marina that will impact .38 acres of coastal marshlands. The parties agree that the construction and maintenance of the marina are marsh-disturbing activities for which a permit is required.

Under the CMPA, a permit application must include, *inter alia*, “[a] description from the applicant of alternative sites and why they are not feasible and a discussion of why the permit should be granted.” O.C.G.A. § 12-5-286(b)(8). An applicant must also provide “[s]uch additional information as is required by the committee to properly evaluate the application.” O.C.G.A. § 12-5-286(b)(12).

When the application is complete and the public has been afforded an opportunity for comment, the Committee follows a two-step process to determine whether to grant a permit. First, the CMPA directs the Committee to “consider the public interest,” which is defined as follows:

- (1) Whether or not unreasonably harmful obstruction to or alteration of the natural flow of navigational water within the affected area will arise as a result of the proposal;
- (2) Whether or not unreasonably harmful or increased erosion, shoaling of channels, or stagnant areas of water will be created; and

- (3) Whether or not the granting of a permit and the completion of the applicant's proposal will unreasonably interfere with the conservation of fish, shrimp, oysters, crabs, clams, or other marine life, wildlife, or other resources, including but not limited to water and oxygen supply.

O.C.G.A. § 12-5-286(g). The Petitioners here do not contest the issuance of the permit based on these public interest considerations.

Instead, the Petitioners challenge the permit based on the second step of the Committee's decision-making process, which directs the Committee to analyze the existence of feasible alternatives. Under O.C.G.A. § 12-5-286(h), "If the committee finds that the application is not contrary to the public interest and that no feasible alternatives exist . . . it shall issue to the applicant a permit." The Code section specifically notes that "[i]t is responsibility of the applicant to demonstrate to the committee that the proposed alteration is not contrary to the public interest and that no feasible alternatives exist." *Id.* These provisions are consistent with a related directive found in O.C.G.A. § 12-5-288(a), which provides, "If the project . . . can be satisfied by the use of an alternative nonmarshland site or by use of existing public facilities, a permit usually should not be granted pursuant to Code Section 12-5-286." Furthermore, "[t]he amount of marshlands to be altered must be minimum in size." O.C.G.A. § 12-5-288(b).

In accordance with the statutory scheme, the Board of Natural Resources has promulgated rules that "establish[] the standards and procedures to be applied by the Coastal Marshlands Protection Committee when reviewing applications for a permit to construct or modify a marina . . ." Ga. Comp. R. & Regs. r. 391-2-3-.03(1). The regulations require that "[a] needs assessment must be submitted to justify the size of the proposed marina." Ga. Comp. R. & Regs. r. 391-2-3-.03(6)(c). The term "needs assessment" is not further defined, and the parties dispute whether the Applicant complied with this requirement.

III. THE COMMITTEE'S MOTION TO DISMISS

Pursuant to O.C.G.A. § 50-13-13(a)(6), this Court is authorized to “dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground” See also Ga. Comp. R. & Regs. r. 616-1-2-.22(1)(i); O.C.G.A. § 9-11-12(b). For the purpose of deciding the Committee’s Motion to Dismiss, the Court assumes that the allegations contained in the Petition are true and construes them in the light most favorable to the Petitioners. Byck v. Georgia Dep’t of Nat. Resources, 1998 Ga. ENV LEXIS 14, *2-3 (OSAH 1998); see Sherman v. Fulton County Bd. of Assessors, 288 Ga. 88, 89 (2010).

In the case at bar, the Petition alleges (1) that the Committee improperly issued the permit without requiring the Applicant to submit a needs assessment; and (2) that by issuing the permit in the absence of the needs assessment, the Committee awarded the Applicant an illegal gratuity. The Committee seeks dismissal of the Petition, arguing that the Petitioners cannot challenge the permit in this manner because their claims are based solely on an allegation that the Committee lacked sufficient information to issue the permit. However, the Committee has mischaracterized the Petitioners’ claims. The Petitioners do not contend that the Applicant failed to meet its burden before the Committee; rather, they argue that the Committee disregarded a legal requirement for permit issuance.

The Committee relies on the recent Georgia Court of Appeals decision in Coastal Marshlands Protection Committee v. Altamaha Riverkeeper, Inc., 315 Ga. App. 510 (2012), to support its position. In that case, the petitioner challenged the issuance of a permit to build a community dock over state-owned marshlands. The dock had been designed to utilize a rail system with a moving platform rather than a traditional planked walkway. The purpose of this design was to minimize shading, which had been associated with a decrease in marsh grass stem density. Altamaha Riverkeeper, Inc., v. Coastal Marshlands Protection Committee, OSAH-

BNR-CM-0821398-98-Howells, 2009 Ga. ENV LEXIS 3 (OSAH 2009). On appeal, the petitioner argued that it could meet its burden of proof by demonstrating that the Committee lacked sufficient information to make a valid public interest determination under O.C.G.A. § 12-5-286(g), as evidenced by a special permit condition requiring the applicant to gather additional post-construction data. The Court of Appeals rejected the petitioner's argument, concluding that "[r]equiring an ALJ to determine whether a permit applicant met its burden before the Committee would vitiate the long-standing rule that an ALJ must make an independent determination of whether the permit would violate the provisions of the applicable statute or regulations." Altamaha Riverkeeper, 315 Ga. App. at 514.

By contrast, the Petitioners here have not asked this Court to revisit the sufficiency of the factual information before the Committee. Instead, the Petitioners assert that the Committee ignored a legal prerequisite for the issuance of the permit: the completion of the needs assessment mandated by Ga. Comp. R. & Regs. r. 391-2-3-.03(6)(c). This Court is authorized to address claims regarding the Committee's alleged failed to adhere to legal standards governing the issuance of a permit. For example, in Altamaha Riverkeeper, Inc. v. Barnes, OSAH-BNR-WQC-1031706-98-Walker, OSAH-BNR-WW-1031708-98-Walker, 2010 Ga. ENV LEXIS 16 (OSAH 2010), the ALJ reversed a permit issued pursuant to the Georgia Water Quality Control Act based, in part, on her determination that the agency had failed to comply with its own rules regarding interbasin transfers. Id. at *38-39.

Similarly, in this case, the issue that the Petitioners have raised is a legal one: whether the Applicant submitted, and the Committee considered, a needs assessment as required by Ga. Comp. R. & Regs. r. 391-2-3-.03(6)(c). The Committee's Motion to Dismiss is therefore denied.

IV. THE PETITIONERS' MOTION FOR SUMMARY DETERMINATION

The Petitioners contend that the Committee erred as a matter of law by granting the permit without requiring the Applicant to submit a needs assessment, as mandated by Ga. Comp. R. & Regs. r. 391-2-3-.03(6)(c). The Committee has not addressed the substance of the Petitioners' Motion. Instead, the Committee opposes the Petitioners' Motion on essentially the same grounds stated in the Committee's Motion to Dismiss. As noted above, the Applicant was required to submit, as part of its permit application, a "needs assessment . . . to justify the size of the proposed marina." Ga. Comp. R. & Regs. r. 391-2-3-.03(6)(c). Because the Committee disregarded this requirement, the Petitioners' Motion is granted, and the permit is reversed.

A. Standard on Summary Determination

Summary determination in this proceeding is governed by Office of State Administrative Hearings ("OSAH") Rule 15, which provides, in relevant part:

A party may move, based on supporting affidavits or other probative evidence, for summary determination in its favor on any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

Ga. Comp. R. & Regs. r. 616-1-2-.15(1). On a motion for summary determination, the moving party must demonstrate that no genuine issue of material fact exists, such that the moving party "is entitled to a judgment as a matter of law on the facts established." Pirkle v. Env'tl. Prot. Div., Dep't of Natural Res., OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (OSAH 2004) (citing Porter v. Felker, 261 Ga. 421 (1991)); see generally Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-05 (2006) (noting that summary determination is "similar to a summary judgment" and elaborating that an administrative law judge "is not required to hold a hearing" on issues properly resolved by summary adjudication).

Further, pursuant to OSAH Rule 15:

When a motion for summary determination is made and supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination in the hearing.

Ga. Comp. R. & Regs. r. 616-1-2-.15(3); see Lockhart v. Dir., Env'tl. Prot. Div., Dep't of Natural Res., OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at *3 (OSAH 2007) (citing Leonaitis v. State Farm Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)).

B. Findings of Undisputed Material Fact

Pursuant to OSAH Rule 15(1), a motion for summary determination shall include “a short and concise statement of each of the material facts as to which the moving party contends there is no genuine issue for determination.” Ga. Comp. R. & Regs. r. 616-1-2-.15(1). Similarly, a response to a statement of material facts must contain “a short and concise statement of each of the material facts as to which the party opposing summary determination contends there exists a genuine issue for determination.” Ga. Comp. R. & Regs. r. 616-1-2-.15(2). The submissions in this case are neither short nor concise. Therefore, the Court has endeavored to streamline the facts presented and has relied only upon those that are both undisputed and material to the issues presented for summary determination.

The Committee responded to the Petitioners' statement of undisputed material facts only by raising objections to the authenticity and/or admissibility of the documents offered as exhibits to the Petitioners' Motion. Subsequently, however, the Committee withdrew its objections to the Petitioners' Exhibits 1, 2, 4, and 7. As a result, the Petitioners' proposed undisputed facts are deemed admitted, to the extent they are properly supported by these exhibits. Additionally, because both parties have relied upon the contents of Petitioners' Exhibits 4 and 7, the Court has also relied upon the contents these documents.

The transcripts of the Committee proceedings, which were offered as Exhibits 5, 6, and 8 to the Petitioners' Motion for Summary Determination, are not necessary to the determination of the Petitioners' Motion and have not been considered in the issuance of this Order. Likewise, the Petitioners' proposed undisputed facts, to the extent they rely upon these documents, have not been considered.

1.

The Applicant is a 144-unit condominium complex located in the eastern part of Chatham County, Georgia, on Wilmington Island along Bull River. (Petitioners' Statement of Undisputed Material Facts ["Undisputed Facts"] ¶ 1; Ex. P-4 at 1.)

2.

The Applicant's complex provides residences for 350 people and has been in operation since 1986 without a private community marina on site. (Undisputed Facts ¶ 2; Ex. P-4 at 1.)

3.

On December 22, 2011, the Committee issued Coastal Marshlands Protection Act Permit Number 655 to the Applicant. The permit authorizes construction and maintenance of a community marina that will impact .38 acres of coastal marshlands protected by the CMPA. (Undisputed Facts ¶¶ 3-4; Ex. P-1 at 1.)

4.

The proposed marina includes a 6-foot by 978-foot fixed walkway which will terminate at a 14-foot by 28-foot fixed deck. A 4-foot by 40-foot ramp will descend to a 6-foot by 6-foot landing and will attach to a 6-foot by 298-foot main floating ramp. Three perpendicular floating docks will extend channelward from the main floating dock. Floating docks A and C will each

measure 6 feet by 162 feet, while floating dock B will measure 6 feet by 86 feet. (Undisputed Facts ¶ 4; Ex. P-1 at 1-2.)

5.

The three floating docks will include 22 finger slips, providing dockage space for 45 boats and ten jet skis. (Undisputed Facts ¶ 5; Ex. P-1 at 1-2.)

6.

Under the permit, construction of the marina will proceed in two phases. Floating dock B and portions of floating docks A and B will be constructed in Phase I. Upon a showing of executed sales contracts for all slips in Phase I, the staff of the Coastal Resources Division is authorized to allow construction of Phase II. (Undisputed Facts ¶¶ 6-7; Ex. P-1 at 1-2.)

7.

The proposed marina will be located approximately 418 feet southeast of the Bull River Marina, a boating facility available for the use of the public. (Undisputed Facts ¶ 8; Ex. P-4 at 2.)

8.

The permit application did not contain a document entitled "Needs Assessment." Instead, the Applicant submitted documents entitled "Alternative[s] Analysis" and "Market Analysis." (Undisputed Facts ¶¶ 24, 59-60; Ex. P-4 at § 8a-e; Ex. P-7.)

9.

In its Alternatives Analysis, the Applicant identified ten marinas available to the public and five public boat ramps in the vicinity of the proposed marina. The availability of slips at three of the identified marinas and one of the public boat ramps are specifically discussed. (Undisputed Facts ¶¶ 25-27; Ex. P-4 at § 8a-e.)

10.

Regarding the Turner's Creek public boat ramp, the Alternatives Analysis states that the ramp is "currently operating over its safe capacity," that it is overcrowded at peak times, and that future expansion is being planned. (Ex. P-4 at § 8e.)

11.

Regarding Hogan's Marina and Sail Harbor Marina, the Alternatives Analysis states that both facilities are "currently operating near 100% capacity" and that they are overcrowded during peak times. (Ex. P-4 at § 8b-c.)

12.

Regarding Bull River Marina, the Alternatives Analysis states, "The marina's website is currently advertising 1400 lineal feet of deepwater dockage and states that 'Slips are available for sailboats and power boats, with more docks to be built in the near future.'" The Alternatives Analysis further notes that "Bull River Marina applied for and has been issued a permit for future expansion." (Ex. P-4 at § 8d.)

13.

According to the Alternatives Analysis, the Applicant "has determined [Bull River Marina] is not a viable alternative." The Alternatives Analysis states that the Applicant and its homeowners' association "consider the business practices of the marina not compatible with those of the residents." No further explanation is provided. (Exhibit P-4 at § 8d.)

14.

In its Market Analysis, the Applicant states that its residents have reserved all of the 45 slips at the proposed marina. The Market Analysis also provides information regarding the budget for the project, the marina's expected annual income and expenses, and the cost of boat

slips at other locations. Finally, the Market Analysis lists the purported benefits of the proposed marina to the Applicant's residents and the State of Georgia. (Ex. P-7.)

15.

Neither the Alternatives Analysis nor the Market Analysis establishes the number of vacant slips at marinas in the vicinity. Additionally, the Applicant did not provide any information regarding whether any of the proposed marina's slips have been reserved by existing boat owners who currently dock their boats at other area marinas. (Ex. P-4 at § 8a-e; Ex. 7.)

C. Analysis

The Applicant's submissions to the Committee failed, as a matter of law, to meet the requirement for a needs assessment. As previously noted, the permitting process for marinas is governed by Ga. Comp. R. & Regs. r. 391-2-3-.03(6), which provides, in pertinent part:

(a) The Coastal Marshlands Protection Committee may issue a permit for a marina in accordance with the requirements of the Coastal Marshlands Protection Act. Unless otherwise determined by the Committee in accordance with subparagraph (h) below, a marina must comply with the following standards or conditions:

...

(c) A needs assessment must be submitted to justify the size of the proposed marina. The Coastal Marshlands Protection Committee may opt for phased build out based on demonstrated need. . . .

Ga. Comp. R. & Regs. r. 391-2-3-.03(6) (emphasis added). This regulation must be read in the context of the CMPA, which requires the submission of "[a] description from the applicant of alternative sites and why they are not feasible and a discussion of why the permit should be granted." O.C.G.A. § 12-5-286(b)(8). Moreover, "[i]f the project . . . can be satisfied by the use of an alternative nonmarshland site or by use of existing public facilities, a permit usually should not be granted pursuant to Code Section 12-5-286." O.C.G.A. § 12-5-288(a).

A needs assessment, then, must include information sufficient to demonstrate that the applicant's need for a marina cannot be fulfilled through the use of existing public facilities. Without this information, an applicant cannot "justify the size of the proposed marina," as required by Ga. Comp. R & Regs. r. 391-2-3-.03(6)(c). Indeed, if existing facilities can satisfy the applicant's need, the applicant cannot justify a marina of any size. The rule therefore requires an applicant to demonstrate that an unfulfilled need for additional slips exists.

Here, the Applicant did not submit a "needs assessment" within the meaning of Ga. Comp. R & Regs. r. 391-2-3-.03(6)(c).. Neither the Alternatives Analysis nor the Market Analysis established that insufficient slips were available in the area to satisfy the demand. Although the Alternatives Analysis included a cursory discussion of existing public facilities, it did not document the number of slip vacancies at local marinas, nor did it provide information regarding the number of slips currently used by residents of Bull River Bluff at these other marinas. If anything, the Alternatives Analysis suggested that the need could be met by available slips at Bull River Marina, a public facility just 418 feet away from the proposed site.⁶ Additionally, the Market Analysis showed only that the Applicant expected to lease all of the marina's boat slips to condominium residents; it provided no information regarding whether utilization rates at other nearby marinas would be affected. Thus, the current whereabouts of boats owned by the Applicant's residents are unknown, raising the possibility that building a new marina would simply create 45 slip vacancies at other area marinas.

Based on the foregoing, this Court finds that the Alternatives Analysis and Market Analysis submitted by the Applicant did not meet the needs assessment requirement of Ga.

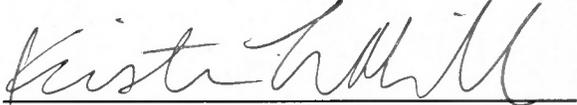
⁶ The Applicant's unsupported opinion that Bull River Marina is not a viable alternative does not establish that an unfulfilled need exists. Further, the Amended Petition alleges that in April 2012, Bull River Marina was purchased by a new owner who intends to refurbish the facility and add 26 boat slips that were authorized by a previously-issued CMPA permit. (Amended Petition, ¶ 74 and Ex. 6, attached thereto.)

Comp. R & Regs. r. 391-2-3-.03(6)(c). Consequently, the Petitioners are entitled to judgment as a matter of law.

V. DECISION

For the foregoing reasons, the Committee's Motion to Dismiss is **DENIED**. The Petitioner's Motion for Summary Determination is **GRANTED**, and the Committee's decision to issue CMPA Permit Number 655 is **REVERSED**.

SO ORDERED, this 10th day of December, 2012.


KRISTIN L. MILLER
Administrative Law Judge