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Title: A Proposal for the Initiation and
Establishment of a County Aquatic
Conservation Area

Requested by: Dade County Board of Commissioners
Commissioner Mike Calhoun

Prepared by: Philip A. Dales III and N. Bartlett Theberge
Research Assistants, Ocean Law Program

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The Problem

Assistance has been requested by the County Commissioners of Dade County, Florida, in creating more accountability to the local citizenry for the conduct of activities on the waters of Biscayne Bay. There may be considerable difficulty with regard to the extent of the exercise of jurisdiction by the county over these waters since they are public navigable waters over State owned bottomlands and are subject to significant State regulatory powers already. (Particular difficulties in addition to a perfunctory list of State regulatory powers were pointed out for consideration in this type of problem in Report #9 of the University of Miami Ocean Law Program's Community Legal Problem Services.)

Initially, the County is interested in drawing together in one place the responsibility for the health and affairs of Biscayne Bay, and directing the coordination of all county administrative decision-making regarding the Bay with respect to a "comprehensive plan" for the Bay, as it is a part of the health and well being of the community heretofore unattended to. This clearly means that the designated authority must undertake legal research to determine as clearly as possible exactly what

State preeminence exists with regard to particular regulatory aspects of activity regarding the Bay, and conforming county regulation therewith, particularly county competence with respect to preservation and conservation within a 'comprehensive plan.'

Secondarily, the County wants to provide the means for the eventual creation of a Bay authority of some fashion in order to completely centralize and expedite local regulation and the coordination thereof. Derogation of private rights through delay would be eliminated and citizens could come before one authority in conforming their private interests to public welfare. Review could be obtained equally swiftly.

Ultimately the problem might be characterized as the desire to have all administrative decisions and hearings on matters regarding the Bay located within County boundaries. The managing authority is thereby directed to communicate with appropriate State and Federal agencies in order to achieve coordination of overlapping jurisdictional powers and perhaps a delegation of some powers subject to State review. For instance, the designated county authority might request the Board of Trustees of the Internal Improvement Trust Fund for designation of the area, boundaries defined, as a county preserve within the State system and to delegate full powers or such limited powers over the area as may relate to the special interests of citizens

and visitors to Dade County.

To this end an ordinance should recognize the problem and the need for better operational procedures for decisions relating to the Bay and should enable a designated county governmental unit within the scope of present county powers to undertake the task of doing something about Biscayne Bay. Consequently, clear enabling language is necessary specifying the tasks to be undertaken. The problem of the exact nature of and jurisdictional power to promulgate particular regulations under this enabling ordinance would be the job of the county attorney's office to resolve from time to time.

With these considerations in mind we offer the following proposed ordinance as the type we believe would be desirable to create a program in relation to Biscayne Bay, which at its inception is clearly within the power of the Board of County Commissioners as relating to the affairs, property and government of Dade County, drawing or creating no additional powers nor exercising any additional regulatory power with regard to the Bay in conflict with Federal or State authorities.

The Proposed Ordinance

ORDINANCE DECLARING BISCAYNE BAY AND ITS ENVIRONS AN "AQUATIC PARK"; AUTHORIZING THE COUNTY MANAGER TO ISSUE RULES AND REGULATIONS; PROVIDING FOR INCLUSION IN THE CODE OF METROPOLITAN DADE COUNTY, FLORIDA; AND PROVIDING AN EFFECTIVE DATE

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA:

Section 1. In recognition that it is in the interest of the public welfare to protect and preserve unique natural aesthetic, and recreational values, Biscayne Bay and its environs is hereby declared to be an area of critical county concern and shall be considered to be an "Aquatic Conservation Area."

Section 2. The County Manager is hereby empowered and directed to:

- a) develop a plan containing both short and long range guidelines for the protection and preservation of said "Aquatic Conservation Area;"
- b) issue appropriate rules and regulations for the protection and preservation of said "Aquatic Conservation Area;" the purpose of such rules and regulations shall also be to centralize, coordinate and review the

acts, decisions, and functions of agencies existing within the County that are associated with the protection and preservation of Biscayne Bay and its environs;

- c) propose expeditiously to the County Board of Commissioners for approval and enactment as supplementary ordinances, all rules and regulations providing for penalties;
- d) conduct a legal study to determine the County's regulatory power over activities associated with the protection and preservation of Biscayne Bay and its environs; and pursuant to such a study delineate the boundaries of said "Aquatic Conservation Area;"
- e) enter into communications with appropriate Federal, State and local authorities having jurisdiction over activities in or on Biscayne Bay and its environs in order to achieve coordination and cooperation among Federal, State and local authorities in the development and management of a plan for the protection and preservation of said "Aquatic Conservation Area;" and also to procure the delegation of State powers necessary to protect and preserve Biscayne Bay and its environs; and to allow adequate administration

of activities associated with the Bay to be conducted within Dade County as the locality most immediately concerned with the welfare of Biscayne Bay and its environs.

Section 3. Conflicts between agencies and between agencies and the plan established for the "Aquatic Conservation Area" are to be resolved by the County Manager.

Section 4. It is the intention of the County Commission, and it is hereby ordained that the provisions of this ordinance shall become and be made a part of the Code of Metropolitan Dade County, Florida; that the sections of this ordinance may be renumbered or relettered to accomplish such intention; and that the word "ordinance" may be changed to "section," "article," or other appropriate word.

Section 5. That the provisions of this ordinance shall become effective ten (10) days after its adoption.

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Discussion

1. The descriptive title, or catchline, of the ordinance is not part of the ordinance, County Code § 1-3, so there is no objection to using 'Aquatic Park' as a descriptive or short title. The ordinance itself characterizes the area with new language, in view of what is desired to be accomplished, to avoid problems with the County Code and possible conflict with the jurisdiction of the Department of Parks and Recreation.

Consequently, this new task can be delegated to the County Manager under Code § 3.04, wherein the County Manager shall administer all units of county government under his jurisdiction and carry out the policies of the Board of Commissioners, which in this case is stated to be the protection and preservation of unique natural, aesthetic and recreational values in an area described as being of critical county concern. Under Section 4.02 the Manager has the powers to issue and place into effect administrative orders, rules and regulations. In other words the Manager can legally flesh-out the plan he is directed to develop and pull together all county functions for uniform regulation, decision-making and review of activities relating to the Bay which the County is presently exercising within its jurisdictional competence. It should be pointed

out that the enabling language does not amend or repeal "by reference only" and no present County departmental agency is usurped of its duty; a supervisory power only will have been created with authority to tie things together, because the Board cannot take the power of a governmental authority and not repeal the existence of that authority. 19 U. Fla L.R. 282 (Fall 1966).

2. Presumably the County can enter into a task such as the one contemplated by the proposed ordinance to the extent of the scope of its jurisdictional competence. That this is the intent of the Board of Commissioners could be stated in the ordinance or implied, so preliminarily the attempt to engage in the protection and preservation of the Bay in the interest of the citizens of Dade and its visitors and to centralize the administration of Bay affairs as they relate to the County is legally permissible. Such activity is clearly in conformity with State policy to protect natural resources as stated in Art. 2 § 7 of the Florida Constitution. Furthermore, the Board is granted "full power and authority to pass ordinances relating to the affairs, property and government of Dade County and to do everything necessary to carry out a central municipal government. Fla. Const. Art. 8 § 11(1)(b).

It is recognized that Dade County has the specific authority to regulate recreational areas, F.S. 167, to exercise

jurisdiction over wharves, vessels, bridges, to abate nuisances and protect the public health F.S. 167.05, to regulate the use of water for other purposes F.S. 176.02(1), to establish anti-pollution measures F.S. 403.088 and to clean-up and improve waterways F.S. 180.06 among others, and in general to exercise its police powers for health, welfare, and safety; exercise all powers not prohibited by the State Constitution and to perform acts consistent with law and which are in the common interest of the people of the County Article 1 § 1.01A(5,7, 21 and 23(Dade County Charter. Under the same provision the Commissioners have the powers to prepare and enforce comprehensive plans for the development of the County. Lastly, the County Code is to be liberally construed. Code §8.06.

We venture to say that the ordinance and its directives as written are clearly within these boundaries of County jurisdiction and further, that the County Manager can collect the enumerated authorized regulatory powers under his supervision and require their conformity to a plan to be developed by him, because surely the development or non-development of Biscayne Bay and its environs is a part of a comprehensive plan for the development of the County. 'Development,' after all, is capable of many meanings, one of which could certainly encompass planning for the continued or renewed health, and the preservation and

conservation of Biscayne Bay to the extent not inconsistent with the powers of existing state authorities.

3. An article on Home Rule in Florida in 19 U. Fla. L.R. at 282 states that the County has frequently relied on Art. 8 § 11 (1) (b) (granting the Commissioners full power and authority to pass ordinances relating to the affairs, property and government of the County) to justify local regulation of matters already regulated by the State. The basic question is what matters come within the phrase, "affairs, property and government"? It has been interpreted on a case by case basis when county authority to regulate has been challenged. The best that can be said of the situation is that it remains unclear.

Turning again to the proposed ordinance, it would appear to be above attack by reason of the nature of its conditional language. The difficulty will come when the County Manager, whether in his plans or in his regulations, attempts to exercise jurisdiction over the activities on the water not clearly within County power to do so. It will, however, be the complaintants' or the State's burden to show such regulation or plan is in its nature beyond the power of the County to enact and enforce. For this reason the ordinance directs the County Manager to conduct an in-depth legal analysis of the extent of the County's jurisdiction, in order that he might know the parameters of his

authority more precisely and will therefore endeavor to confer with appropriate State officials to achieve a delegation of power or at least permission to regulate in questionable areas of County jurisdiction. This approach will hopefully result in harmony in the management of the coastal zone, and at the same time will not prevent the County from ordering its own shop with regard to the Bay and direct someone in the County's behalf to work with the State to try to achieve greater local accountability to the citizens of the County with regard to Bay activities.

4. A word on case law. There may be an argument that the County can pass stricter regulations in areas where the State has already acted, but it would appear that this would depend heavily on the language of the State statute in question, that is, is it capable of interpretation as preempting the field. See Lehman v. Buchanan, App. 190 So. 2d 594 (1966) [stiffer local drunk driving penalty upheld] and in regard to whether the proposed ordinance goes beyond county jurisdiction, the court in State ex rel. Dade County v. Brantigan, 224 So. 2d 688 (1969) and in E.B. Elliot Adv. Co. v. Metropolitan Dade County, 425 F. 2d 1141, petition dismissed 91 S. Ct. R., 400 U.S. 805, 27 L. Ed.2d 35, found the word "inconsistent" as used in the Constitutional provision granting Dade County powers conferred

upon municipalities to the extent they are not inconsistent with powers of existing municipalities or general laws to mean contradictory in the sense of legislative provisions which cannot coexist.

Lastly, the court in Miami Shores v. Cowart, 108 So. 2d 408 (1959) stated that under the home rule amendment the charter could authorize the Board of County Commissioners to regulate on a county-wide basis according to a uniform plan those municipal services that were susceptible to, and could be most effectively carried out under a regulatory plan applicable to the entire metropolitan area. The Court continued by stating that the question of what is or is not a purely local function or power of a municipality is a mixed question of law and fact to be determined judicially, if and when authority of the Board to legislate concerning a particular municipal function is controverted.

These cases are not the result of a comprehensive search but rather are illustrative of the conceptual framework we believe our proposed statute falls within, that is, granting it a presumption of validity since the legality is, after all, open to question. And we are of the opinion that those questions should arise on a regulation by regulation basis, rather than with regard to enabling language.

Conclusion

For all of the reasons referred to above we are of the opinion that a means similar to that prescribed in the proposed ordinance as written would be a more favorable method of accomplishing the ends desired by the County Board of Commissioners to the most favorable advantage of the County. It should overcome the difficulties initially perceived in regard to what vehicle should be used to administer county regulatory powers over Bay-related activities in order that the Bay might be protected in the interests of the local citizenry.

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