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OCEAN LAW PROGRAM

COMMUNITY LEGAL PROBLEM SERVICES

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Title: A Locality's Power to Establish an "Aquatic Park" in Public Navigable Waters Over State Owned Bottomlands

Requested by: Greater Miami Chamber of Commerce

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PROPOSED: ORDINANCE DECLARING BISCAYNE BAY AND ITS ENVIRONS AN "AQUATIC PARK"; AUTHORIZING THE PARK AND RECREATION DEPARTMENT TO ISSUE RULES AND REGULATIONS, SUBJECT TO STATE AND FEDERAL APPROVAL; 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. Biscayne Bay and its environs is hereby declared to be an "Aquatic Park" for the use and benefit of the citizens of Dade County.

Section 2. The Park and Recreation Department shall issue such reasonable rules and regulations concerning the use of said "Aquatic Park" by the residents of and visitors to Dade County as may be approved by appropriate State and Federal officials.

Proposed Amended Section 2. The County Manager is hereby empowered to develop a plan for the protection and preservation of said "Aquatic Park" including the initiation and coordination of appropriate research and analysis. The development of both short and long-range plans, and the promulgation of rules and regulations which, after ratification by the Board of County

Commissioners and the Trustees of the Internal Improvement Trust Fund, shall have the force and effect of law.

Section 3. 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 4. That the provisions of this ordinance shall become effective ten (10) days after its adoption.

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A LOCALITY'S POWER TO ESTABLISH AN "AQUATIC PARK" IN PUBLIC NAVIGABLE WATERS OVER STATE OWNED BOTTOMLANDS

BRIEF ANSWER

The legal foundation of the proposed ordinance is insufficient to give the County clear authority to declare "Biscayne Bay And Its Environs" a County aquatic park.

SUBJECT

The legal sufficiency of a proposed "ORDINANCE DECLARING BISCAYNE BAY AND ITS ENVIRONS AN 'AQUATIC PARK'; AUTHORIZING THE PARK AND RECREATION DEPARTMENT TO ISSUE RULES AND REGULATIONS SUBJECT TO STATE AND FEDERAL APPROVAL; PROVIDING FOR INCLUSION IN THE CODE OF METROPOLITAN DADE COUNTY, FLORIDA; AND PROVIDING AN EFFECTIVE DATE." [see attached Statute]

ISSUES

1. May a County establish a "park" in a water area in which it has no property rights?
2. If not specifically prohibited from establishing a park in such an area, would the designation of the area as a park enable the County to exercise any regulatory powers it does not presently possess?

3. Will the establishment of a park under the attached ordinance create potential legal conflicts for the County?

CONCLUSIONS

1. This appears to be a case of first impression. No support can be found for a Locality designating as a park an area over which it exercises no property rights.
2. Designation of the area as a park would be merely a forensic exercise. It would create no regulatory powers the Locality does not presently possess under accepted and delegated police powers.
3. The establishment of a park in Biscayne Bay under this ordinance would create potential conflicts of Federal, State, and Local jurisdiction and possible constitutional challenges for the Locality.

It appears that this is a case of first impression with important and serious implications for intergovernmental regulation and cooperation, developing coastal law, and concepts of coastal management and regulation procedures. Consequently, in arriving at our conclusions as to the legal sufficiency of the proposed ordinance, we were primarily of the opinion that any means of exercising any power perceived to be permissible under the broad enabling language of the Home Rule Charter for Dade

County should be approached with due solemnity for these implications and that a more thorough legal analysis should be required into exactly what is the relationship between state and county jurisdiction, regulation and what latitude exists for the exercise of powers by the county where the state has failed to exercise its powers or the county desires more stringent measures. We would be remiss if we failed to mention that alternative methods should also be explored - publicly - before a municipality moves without regard to the problems discussed herein. The proposed ordinance in our opinion is a legally improper vehicle for the achievement of what may otherwise be attainable goals of county government. Further elaboration on the latter opinion is not the object of this memorandum, but the following discussion, we think, reveals legal insufficiencies in the present proposal sufficient to require substantial reconsideration of the means to be utilized by the county commissioners to obtain "more accountability to local citizenry for the conduct of activities on the waters of Biscayne Bay."

DISCUSSION

1. Is it within the powers of the county commissioners to delimit Biscayne Bay as a "park"? It would appear not to be. We submit that the commonly accepted definition of a 'park'

cannot be construed to include what is essentially a volume of water over state owned bottomlands. (We might add that at this time it is not entirely clear that interests in the water column/space are capable of being separated from interests in the bottomlands over which the waters lie.) Traditionally, parks are created through land purchase and/or dedication (Ch. 167.09 F.S.) and it is not clear that the definition of "park" is capable of interpretation as including such an area as Biscayne Bay. Although Chapter 26 of the Code of Dade County defines parks to mean parks, lagoons, and waterways which are under the control of or assigned for maintenance to the Department of Park and Recreation, such a designation has not been made and the making of such a designation cannot lift itself by its own bootstraps and otherwise achieve what may not be legally permissible as beyond normal county police powers. In the County Code "park property" is defined to cover all areas and locations described in the definition of "park" cited above. (County Code Ch. 26-1(6)) All the areas referred to exist within the boundaries of <u>land</u> areas already designated as parks in which the County has a property interest. In this regard we point out that the County has no property interest in Biscayne Bay and ownership of these submerged lands and control of the water column above rest within the State. The

administration of this area is delegated to the Board of Trustees (Ch. 253.03 F.S. and Ch. 253.68 F.S.). Furthermore, by implication in the resolution of Attorney General Earl Faircloth of 24 September 1968 to the Board of Trustees, an aquatic preserve is grounded in ownership of bottomland. It would appear State power is paramount in this area (see discussion 3 for State powers) and would preclude a Locality from unilaterally declaring such an area to be a park in absence of State delegation of the power to do so.

In regard to the proposed section two amendment, if the area is not under the control of the Department of Parks and Recreation, can it be a "park", and who will be responsible for the management, operation and care of the area, since the County Code, Article X, provides that parks will be managed by the Department of Parks? Again, we believe that the vehicle chosen is creating these difficulties, and attention should be given to these problems.

2. Under Article X of the Code of Dade County, the Department of Parks and Recreation has the power to administer, manage, operate, and care for all real and personal property held or acquired by the County for a park. In this case, there is no such acquired property upon which the Department of Parks and Recreation may exercise authority. The designation of the area

as a park would in no way enhance the County's power over the area beyond the normally accepted and delegated police powers. The state already provides for a permit system for waste disposal and authorizes County establishment of anti-pollution measures (1967 AWPCA, Ch. 403.088 F.S.) with public hearings (Ch. 17 Fla. Admin. Code) and the State has already made provision for numicipality cleanup and improvement of waterways (Ch. 180.06 F.S.). The County cannot create more power than it constitutionally has simply by designating the area as a "park".

3. The establishment of a park would create potential jurisdictional and constitutional conflicts for the County. The ordinance in question fails to exclude areas of submerged land in private ownership, areas under Federal control (i.e. Biscayne National Monument), and ports and harbors. State powers in the area include: control over the regulation of all waters (Ch. 373 F.S.); ownership and jurisdiction of the submerged land (Ch. 370.3 F.S.); right to lease the bottom and water column (Ch. 253.68 F.S.); ownership and jurisdiction over all fish and aquatic life (Ch. 370.10, 370.11 and 370.12 F.S.); regulation of ports and harbors (Ch. 307.01 and 309 F.S.); regulation of navigation in intercoastal waterways to the exclusion of other political subdivisions (Laws of 1973). Consequently, the

establishment of such a park would seem to raise many potential conflicts between Federal, State and County jurisdiction. Public hearings on both the State and County levels would seem to be in order. Failure to exclude privately owned, submerged land could raise the specter of inverse condemnation and the requirement of compensation. The potential Local and Federal conflicts regarding Biscayne National Monument also have not been addressed. Nor have potential conflicts with Federal navigation powers been considered. Designation of the water area including the intercoastal waterway as being for "the use of the citizens of Dade County" could infringe upon Federal and State jurisdiction over a public navigable waterway. Finally, the ordinance is unconstitutionally vague in defining "Biscayne Bay and its environs". Individuals in conflict with regulations under this ordinance could claim lack of notice, a due process requirement.

SUMMARY

Although it is acknowledged that a County has the authority to regulate recreational areas, create parks, 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 (Act 1, S.1.01A (5,7,21 and 23) Dade County Charter; Ch. 167 F.S.; Miami Shores Village v. Cowart (Fla. 1959), 108 So. 2d 468), we feel the County has no clear authority to designate "Biscayne Bay and its environs" as an aquatic park and the State has paramount rights in this area. Such an action by a County would be inconsistent with State law. The County has no property rights in this area and has no clear power to designate the area as an aquatic park. Such a designation would serve no useful purpose. It would create no regulatory powers not presently existing and would serve only to create conflict with State and Federal authority.

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