

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GERALD A. ROBBINS,                    )  
  )  
    Petitioner,                        )  
  )  
vs.                                        )     CASE NO. 94-2720RP  
  )  
SOUTHWEST FLORIDA WATER            )  
MANAGEMENT DISTRICT,                )  
  )  
    Respondent.                        )  
\_\_\_\_\_)

SUMMARY FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Susan B. Kirkland, held a hearing on Respondent's Motion to Dismiss by telephonic conference on April 11, 1995.

APPEARANCES

For Petitioner: Gerald Robbins, Pro Se  
1026 Biltmore Drive Northwest  
Winter Haven, Florida 33881

For Respondent: James A. Robinson  
Senior Attorney  
Southwest Florida Water Management District  
2379 Broad Street  
Brooksville, Florida 34609-6899

STATEMENT OF THE ISSUES

Whether Respondent's proposed amendments to subsections (1) and (7) of Rule 40D-4.051, Florida Administrative Code are invalid exercises of delegated legislative authority.

PRELIMINARY STATEMENT

On May 13, 1994, Petitioner, Gerald A. Robbins, filed a Petition to Challenge Proposed Rule 40D-4.051. On May 20, 1994, Petitioner filed an Amended Petition to Challenge Proposed Rule 40D-4.051, requesting that subsections (1) and (7) be declared invalid as an invalid exercise of delegated legislative authority. Respondent, Southwest Florida Water Management District, filed a Motion to Dismiss Petition. The parties waived the 30 day requirement set forth in Section 120.54(4)(c), Florida Statutes. By Order dated June 28, 1994, the undersigned Hearing Officer dismissed the portion of the rule challenge as it related to Subsection (7). Petitioner appealed the Order in Gerald Robbins v. Southwest Florida Water Management District, Case No. 94-1717, 5th District Court of Appeal. By Order dated October 10, 1994, the court denied Petitioner's Petition for Review of Non-Final Administrative Action. Petitioner filed a

Motion for Clarification of Order and Petition to Enforce Mandate of This Court. The court denied the untimely motion by Order dated December 7, 1994.

On February 13, 1995, Respondent filed Respondent's Motion to Dismiss. On February 21, 1995, the undersigned Hearing Officer entered an Order to Show Cause, requiring the Petitioner to file a response showing cause why the Motion to Dismiss should not be granted. On March 9, 1995, Petitioner filed Petitioner's Response to Respondent's Motion to Dismiss and Petitioner's Response to Order to Show Cause. On March 27, 1995, Petitioner filed a Supplement to Petitioner's Response to Show Cause Order.

A hearing was held on the Motion to Dismiss by telephonic conference on April 11, 1995.

#### FINDINGS OF FACT

1. On April 22, 1994, Respondent, Southwest Florida Water Management District (SFWMD), published proposed amendments to Rule 40D-4.051 in the Florida Administrative Weekly, Volume 20, Number 16, at page 2450. The portions which are the subject of this proceedings are as follows:

- \* 40D-4.051 Exemptions  
<<(1) Exemptions are found in>> [[The following activities are exempt from permitting under this chapter:  
(1) The activities specified in]] Sections 373.406, Florida Statutes.  
(2)-(7) No Change.

\* Note: In the above quotation, language added to the statute is within the <<>>; deleted language is within the [[]].

2. On May 13, 1994, Petitioner, Gerald A. Robbins, filed a Petition to Challenge Proposed Rule 40D-4.051. On May 20, 1994, Petitioner filed an Amended Petition to Challenge Proposed Rule 40D-4.051.

3. In its rule challenge, Petitioner requests that 40D-4.051(1) be rewritten as follows: "Exemptions are as found in Sections 373.406 AND 403.927 Florida Statutes."

4. On July 1, 1994, Respondent withdrew its proposed amendment to Subsection (1) of Rule 40D-4.051. The following Notice of Withdrawal appeared in Florida Administrative Weekly, Volume 20, No. 26:

Southwest Florida Water Management District	
RULE TITLES:	RULE NOS.:
Exemptions	40D-4.051(1)

#### NOTICE OF WITHDRAWAL

Notice is hereby given that the above proposed rule amendment, published in the Florida Administrative Weekly, Volume 20, Number 16, on Page 2450, April 22, 1994, have (sic) been withdrawn. This is the sole subsection being withdrawn from rulemaking pursuant to Section 120.54(13)(b), Florida Statutes. The remainder

of the proposed amendments to Section 40D-4.051, Florida Administrative Code remains subject to Section 120.54(1), Florida Statutes.

5. By Order dated June 28, 1994, the portion of Petitioner's rule challenge relating to Rule 40D-4.051(7) was dismissed. Petitioner appealed the Order to the Fifth District Court of Appeal, *Gerald A. Robbins v. Southwest Florida Water Management District*, Case No. 94-1717. The court denied Petitioner's Petition for Review of Non-Final Administrative Action by Order dated October 10, 1994.

#### CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.54, Florida Statutes.

7. Section 120.54(4)(a), Florida Statutes, provides:

Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule on the ground that the proposed rule is an invalid exercise of delegated legislative authority.

8. Petitioner's request for relief as it relates to proposed Rule 40D-4.051(1) is essentially a request to amend the subsection to include language concerning exemptions in Section 404.927, Florida Statutes. This is not a proper request pursuant to a challenge to a proposed rule. Petitioner's remedy is set forth in Section 120.54(5) which provides:

Any person regulated by an agency or having a substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule or provide the minimum public information required by s. 120.53. The petition shall specify the proposed rule and action requested. Not later than 30 calendar days after the date of filing a petition, the agency shall initiate rulemaking proceedings under this act, otherwise comply with the requested action, or deny the petition with a written statement of its reasons for the denial.

9. Additionally, the Respondent's withdrawal of the proposed amendment to Rule 40D-4.051(1) renders the rule challenge moot. In *State of Florida, Department of Health and Rehabilitative Services v. Alice P.*, 367 So. 2d 1045, 1053 (Fla. 1st DCA 1979), the court held that an agency's withdrawal of the proposed rules which were challenged in a Section 120.54(4) proceeding rendered moot the issue of whether the proposed rules were an invalid exercise of delegated legislative authority moot.

10. There were no proposed changes to Rule 40D-4.051(7), Florida Statutes, and the notice of proposed rulemaking so indicated. Petitioner is challenging the wording of subsection (7) as it exists in the currently adopted rule. A challenge to the validity of Rule 40D-4.051(7) should be by a Section 120.56 proceeding rather than a Section 120.54(4) proceeding.

On the basis of all of the foregoing Findings of Fact and Conclusions of Law, Respondent's Motion to Dismiss is GRANTED and it is ORDERED:

That the Amended Petition to Challenge Proposed Rule 40D-4.051 is DISMISSED.

DONE AND ORDERED this 30th day of June, 1995, in Tallahassee, Leon County, Florida.

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SUSAN B. KIRKLAND  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of June, 1995.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Summary Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review

proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal in the appellate district where the agency maintains its headquarters or where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.