# BEFORE THE GOVERNING BOARD OF THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT

04 SEP 27 PN 2:00

ROYAL PALM BEACH COLONY, L. P.,

Petitioner,

٧.

AP

GB Order No. SFWMD 99-47 FOF ERP DOAH Case No. 98-2375 SBK- Cib

SOUTH FLORIDA WATER MANAGEMENT DISTRICT.

Respondent.

and

1000 Friends of Florida, Inc.

Intervenor.

## **FINAL ORDER**

On March 9, 1999 Administrative Law Judge ("ALJ"), Susan B. Kirkland, Division of Administrative Hearings, filed with the South Florida Water Management District ("SFWMD") Governing Board, a Recommended Order, a copy of which is attached hereto as Exhibit "A". Petitioner, Royal Palm Beach Colony, L.P. ("RPBC"), filed exceptions to the Recommended Order, which were adopted by Intervenor, Indian Trail Improvement District ("ITID"). SFWMD staff filed responses to the exceptions. Copies of RPBC's exceptions and SFWMD's responses are attached as Exhibits "B" and "C" respectively.

This matter arises out of a challenge brought by RPBC to SFWMD's proposed determination that construction of three houses within ITID's Unit of Development No. 11 cannot be undertaken pursuant to the no-notice environmental resource permit

("ERP") granted by Rule 40E-400.315, Fla. Admin. Code. RPBC requested an administrative hearing challenging the proposed permit denial pursuant to Section 120.569 and 120.57, Fla. Stat.. Petitions for leave to intervene by 1000 Friends of Florida and the ITID were granted, and a formal administrative hearing was conducted by the ALJ, Susan B. Kirkland at the Palm Beach County Courthouse in West Palm Beach, Florida.

The Governing Board may reject or modify a finding of fact only if it finds upon examination of the entire record that the finding of fact is not based on competent, substantial evidence. Subsection 120.57(1)(I), Fla. Stat. Competent, substantial evidence has been defined as "such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1975); Gould v. Division of Land Sales, 477 So. 2d 612 (Fla. 1st DCA 1985).

Having considered the Recommended Order entered by the ALJ, the exceptions filed thereto by the Petitioner, and the Responses to Exceptions filed by SFWMD staff and having further reviewed the transcript and record of this proceeding and being otherwise fully advised in the premises:

#### IT IS ORDERED that:

- (1) The ALJ's Recommended Order dated March 9, 1999 is adopted in toto with the following modifications:
- a. Page 9, first full paragraph of quoted material, seventh line, the rule citation should be corrected to read "40E-4.301(1)(d)".

- b. Page 9, paragraph number 23, first line, "system" should be inserted after "management".
- c. Page 17, paragraph number 44, last sentence, the rule citation should be corrected to read "40E-4.301(1)(a)-(c)".
- d. Page 17, paragraph number 45, first line, the rule citation should be corrected to read "40E-4.301(1)(d)".
- e. Page 18, continuation of paragraph number 45, first line, "of" preceding "provided" should be deleted.
- f. Page 18, continuation of paragraph number 45, last sentence, "Palm" should be inserted after "Royal" and the rule citation should be corrected to read "40E-4.301(1)(d)".
- (2) The exceptions filed by Petitioner are denied for the reasons set forth in the responses to the exceptions filed by SFWMD staff. As modified below, those responses are adopted and incorporated herein with the following modifications:
- a. Page 6, paragraph number 3, third sentence "1992" should be replaced by "1990" and the citation to the Parties Joint Prehearing Stipulation should be replaced by "[Robbins T: 534-535]".
- b. Page 7, paragraph number 5, heading, "AND CONCLUSION OF LAW NUMBER 39" should be inserted at the end of the heading. In the first sentence, "exceed" should be changed to "exceeded".
- c. Page 8, continuation of paragraph number 5, last sentence, "and conclusion of law" should be inserted after "fact".

- d. Page 9, paragraph number 7, last sentence should be replaced with "[b]ecause this finding of fact is based upon competent, substantial evidence, it must be accepted."
- e. Page 9, paragraph number 8, second sentence, add ",nor was information provided concerning the potential impacts to off-site properties from the construction on the three lots" at the end of the sentence. Also, the citation to the transcript should be "T: 725 728". The following should be inserted before the last sentence: "[f]urther, RPBC mischaracterizes the findings of fact and corresponding conclusion of law by omitting a pertinent portion of Finding of Fact number 28 that relates those findings and conclusion to lack of information in RPBC's application. Although RPBC may have provided some of the missing information at hearing, RPBC's own expert testified that at the time of the application he had not completed the final design and had not performed the calculations he was testifying to at hearing. [Pike: T- 384]"
- f. Page 12, paragraph number 13, second sentence, "and conclusion of law" should be inserted after "fact", "addresses" should be changed to "address" and "does" should be changed to "do".
- g. Page 13, paragraph number 14, first sentence, "not" should be inserted before "supported" and the period after "evidence" should be changed to a comma. The following should be inserted prior to the last sentence: "RPBC contends that this conclusion of law is not supported by competent, substantial evidence because no definition of "common plan of sale" exists in the record. However, Terrie Bates testified to the origin of the term in the District's rules. [T: 196-197]"

- h. Page 14, paragraph number 16, first sentence, "not" should be inserted before "comply".
- i. Page 15, continuation of paragraph number 16, first sentence of first full paragraph, "at paragraph number 10" should be inserted after "response" and "10" should be changed to "32".

#### **NOTICE OF RIGHTS**

Section 120.569(1), Fla. Stat. (1997), requires that "each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review, and shall state the time limits which apply." Please note that this Notice of Rights is not intended to provide legal advice. Not all the legal proceedings detailed below may be an applicable or appropriate remedy. You may wish to consult an attorney regarding your legal rights.

## **Petition for Administrative Proceedings**

- 1. A person whose substantial interests are affected by the South Florida Water Management District's (SFWMD) action has the right to request an administrative hearing on that action. The affected person may request either a formal or an informal hearing, as set forth below. A point of entry into administrative proceedings is governed by Rules 28-106.111 and 40E-1.511, Fla. Admin. Code, (also published as an exception to the Uniform Rules of Procedure as Rule 40E-0.109), as set forth below. Petitions are deemed filed upon receipt of the original documents by the SFWMD Clerk.
- a. <u>Formal Administrative Hearing:</u> If a genuine issue(s) of material fact is in dispute, the affected person seeking a formal hearing on a SFWMD decision which does or may determine their substantial interests shall file a petition for hearing pursuant to Sections 120.569 and 120.57(1), Fla. Stat. or for mediation pursuant to Section 120.573, Fla. Stat. within 21 days, except as provided in subsections c. and d. below, of either written notice through mail or posting or publication of notice that the SFWMD has or intends to take final agency action. Petitions must substantially comply with the requirements of Rule 28-106.201(2), Fla. Admin. Code, a copy of the which is attached to this Notice of Rights.
- b. <u>Informal Administrative Hearing:</u> If there are no issues of material fact in dispute, the affected person seeking an informal hearing on a SFWMD decision which does or may determine their substantial interests shall file a petition for hearing pursuant to Sections 120.569 and 120.57(2), Fla. Stat. or for mediation pursuant to Section 120.573, Fla. Stat. within 21 days, except as provided in subsections c. and d. below, of either written notice through mail or posting or publication of notice that the SFWMD has or intends to take final agency action. Petitions must substantially comply with the requirements of Rule 28-106.301(2), Fla. Admin. Code, a copy of the which is attached to this Notice of Rights.

#### c. Administrative Complaint and Order:

If a Respondent objects to a SFWMD Administrative Complaint and Order, pursuant to Section 373.119, Fla. Stat. (1997), the person named in the Administrative Complaint and Order may file a petition for a hearing no later than 14 days after the date such order is served. Petitions must substantially comply with the requirements of either subsection a. or b. above.

d. State Lands Environmental Resource Permit: Pursuant to Section 373.427, Fla. Stat., and Rule 40E-1.511(3), Fla. Admin. Code (also published as an exception to the Uniform Rules of Procedure as Rule 40E-0.109(2)(c)), a petition objecting to the SFWMD's agency action regarding consolidated applications for Environmental Resource Permits and Use of Sovereign Submerged Lands (SLERPs), must

be filed within 14 days of the notice of consolidated intent to grant or deny the SLERP. Petitions must substantially comply with the requirements of either subsection a. or b. above.

## e. Emergency Authorization and Order:

A person whose substantial interests are affected by a SFWMD Emergency Authorization and Order, has a right to file a petition under Sections 120.569, 120.57(1), and 120.57(2), Fla. Stat., as provided in subsections a. and b. above. However, the person, or the agent of the person responsible for causing or contributing to the emergency conditions shall take whatever action necessary to cause immediate compliance with the terms of the Emergency Authorization and Order.

- f. Order for Emergency Action: A person whose substantial interests are affected by a SFWMD Order for Emergency Action has a right to file a petition pursuant to Rules 28-107.005 and 40E-1.611, Fla. Admin. Code, copies of which are attached to this Notice of Rights, and Section 373.119(3), Fla. Stat., for a hearing on the Order. Any subsequent agency action or proposed agency action to initiate a formal revocation proceeding shall be separately noticed pursuant to section g. below.
- g. <u>Permit Suspension</u>, <u>Revocation</u>, <u>Annulment</u>, <u>and Withdrawal</u>: If the SFWMD issues an administrative complaint to suspend, revoke, annul, or withdraw a permit, the permittee may request a hearing to be conducted in accordance with Sections 120.569 and 120.57, Fla. Stat., within 21 days of either written notice through mail or posting or publication of notice that the SFWMD has or intends to take final agency action. Petitions must substantially comply with the requirements of Rule 28-107.004(3), Fla. Admin. Code, a copy of the which is attached to this Notice of Rights.
- 2. Because the administrative hearing process is designed to formulate final agency action, the filing of a petition means that the SFWMD's final action may be different from the position taken by it previously. Persons whose substantial interests may be affected by any such final decision of the SFWMD shall have, pursuant to Rule 40E-1.511(2), Fla. Admin. Code (also published as an exception to the Uniform Rules of Procedure as Rule 40E-0.109(2)(c)), an additional 21 days from the date of receipt of notice of said decision to request an administrative hearing. However, the scope of the administrative hearing shall be limited to the substantial deviation.
- 3. Pursuant to Rule 40E-1.511(4), Fla. Admin. Code, substantially affected persons entitled to a hearing pursuant to Section 120.57(1), Fla. Stat., may waive their right to such a hearing and request an informal hearing before the Governing Board pursuant to Section 120.57(2), Fla. Stat., which may be granted at the option of the Governing Board.
- 4. Pursuant to Rule 28-106.111(3), Fla. Admin. Code, persons may file with the SFWMD a request for extension of time for filing a petition. The SFWMD, for good cause shown, may grant the extension. The request for extension must contain a certificate that the petitioner has consulted with all other parties, if any, concerning the extension and that the SFWMD and all other parties agree to the extension.

#### **CIRCUIT COURT**

- 5. Pursuant to Section 373.617, Fla. Stat., any substantially affected person who claims that final agency action of the SFWMD relating to permit decisions constitutes an unconstitutional taking of property without just compensation may seek judicial review of the action in circuit court by filing a civil action in the circuit court in the judicial circuit in which the affected property is located within 90 days of the rendering of the SFWMD's final agency action.
- 6. Pursuant to Section 403.412, Fla. Stat., any citizen of Florida may bring an action for injunctive relief against the SFWMD to compel the SFWMD to enforce the laws of Chapter 373, Fla. Stat., and Title 40E, Fla. Admin. Code. The complaining party must file with the SFWMD Clerk a verified complaint setting forth the facts upon which the complaint is based and the manner in which the complaining party is affected. If the SFWMD does not take appropriate action on the complaint within 30 days of receipt, the complaining party may then file a civil suit for injunctive relief in the 15th Judicial Circuit in and for Palm Beach County or circuit court in the county where the cause of action allegedly occurred.

7. Pursuant to Section 373.433, Fla. Stat., a private citizen of Florida may file suit in circuit court to require the abatement of any stormwater management system, dam, impoundment, reservoir, appurtenant work or works that violate the provisions of Chapter 373, Fla. Stat.

#### DISTRICT COURT OF APPEAL

8. Pursuant to Section 120.68, Fla. Stat., a party who is adversely affected by final SFWMD action may seek judicial review of the SFWMD's final decision by filing a notice of appeal pursuant to Florida Rule of Appellate Procedure 9.110 in the Fourth District Court of Appeal or in the appellate district where a party seek grant of the final SFWMD action.

# LAND AND WATER ADJUDICATORY COMMISSION

9. A party to a "proceeding below" may seek review by the Land and Water Adjudicatory Commission (LAWAC) of SFWMD's final agency action to determine if such action is consistent with the provisions and purposes of Chapter 373, Fla. Stat. Pursuant to Section 373.114, Fla. Stat., and Rules 42-2.013 and 42-2.0132, Fla. Admin. Code, a request for review of (a) an order or rule of the SFWMD must be filed with LAWAC within 20 days after rendition of the order or adoption of the rule sought to be reviewed; (b) an order of the Department of Environmental Protection (DEP) requiring amendment or repeal of a SFWMD rule must be filed with LAWAC within 30 days of rendition of the DEP's order, and (c) a SFWMD order entered pursuant to a formal administrative hearing under Section 120.57(1), Fla. Stat., must be filed no later than 20 days after rendition of the SFWMD's final order. Simultaneous with filing, a copy of the request for review must be served on the DEP Secretary, any person named in the SFWMD or DEP final order, and all parties to the proceeding below. A copy of Rule 42-2.013, Fla. Admin. Code is attached to this Notice of Rights.

# PRIVATE PROPERTY RIGHTS PROTECTION ACT

10. A property owner who alleges a specific action of the SFWMD has inordinately burdened an existing use of the real property, or a vested right to a specific use of the real property, may file a claim in the circuit court where the real property is located within 1 year of the SFWMD action pursuant to the procedures set forth in Subsection 70.001(4)(a), Fla. Stat.

# LAND USE AND ENVIRONMENTAL DISPUTE RESOLUTION

11. A property owner who alleges that a SFWMD development order (as that term is defined in Section 70.51(2)(a), Fla. Stat. to include permits) or SFWMD enforcement action is unreasonable, or unfairly burdens the use of the real property, may file a request for relief with the SFWMD within 30 days of receipt of the SFWMD's order or notice of agency action pursuant to the procedures set forth in Subsections 70.51(4) and (6), Fla. Stat.

#### MEDIATION

12. A person whose substantial interests are, or may be, affected by the SFWMD's action may choose mediation as an alternative remedy under Section 120.573, Fla. Stat. Pursuant to Rule 28-106.111(2), Fla. Admin. Code, the petition for mediation shall be filed within 21 days of either written notice through mail or posting or publication of notice that the SFWMD has or intends to take final agency action. Choosing mediation will not adversely affect the right to an administrative hearing if mediation does not result in settlement.

Pursuant to Rule 28-106.402, Fla. Admin. Code, the contents of the petition for mediation shall contain the following information:

- (1) the name, address, and telephone number of the person requesting mediation and that person's representative, if any;
  - (2) a statement of the preliminary agency action;
- (3) an explanation of how the person's substantial interests will be affected by the agency determination; and
  - (4) a statement of relief sought.

As provided in Section 120.573, Fla. Stat. (1997), the timely agreement of all the parties to mediate will toll the time limitations imposed by Sections 120.569 and 120.57, Fla. Stat., for requesting and holding an

administrative hearing. Unless otherwise agreed by the parties, the mediation must be concluded within 60 days of the execution of the agreement. If mediation results in settlement of the dispute, the SFWMD must enter a final order incorporating the agreement of the parties. Persons whose substantial interest will be affected by such a modified agency decision have a right to petition for hearing within 21 days of receipt of the final order in accordance with the requirements of Sections 120.569 and 120.57, Fla. Stat., and SFWMD Rule 28-106.201(2), Fla. Admin. Code. If mediation terminates without settlement of the dispute, the SFWMD shall notify all parties in writing that the administrative hearing process under Sections 120.569 and 120.57, Fla. Stat., remain available for disposition of the dispute, and the notice will specify the deadlines that then will apply for challenging the agency action.

#### **VARIANCES AND WAIVERS**

- A person who is subject to regulation pursuant to a SFWMD rule and believes the application of that rule will create a substantial hardship or will violate principles of fairness (as those terms are defined in Subsection 120.542(2), Fla. Stat.) and can demonstrate that the purpose of the underlying statute will be or has been achieved by other means, may file a petition with the SFWMD Clerk requesting a variance from or waiver of the SFWMD rule. Applying for a variance or waiver does not substitute or extend the time for filing a petition for an administrative hearing or exercising any other right that a person may have concerning the SFWMD's action. Pursuant to Rule 28-104.002(2), Fla. Admin. Code, the petition must include the following information:
- the caption shall read: Petition for (Variance from) or (Waiver of) Rule (Citation)

(b)

- The name, address, telephone number and any facsimile number of the petitioner;
- The name, address telephone number and any facsimile number of the attorney or qualified (c) representative of the petitioner, (if any);
  - the applicable rule or portion of the rule; (d)
  - the citation to the statue the rule is implementing; (e)
  - (f) the type of action requested;
- the specific facts that demonstrate a substantial hardship or violation of principals of (g) fairness that would justify a waiver or variance for the petitioner;
- the reason why the variance or the waiver requested would serve the purposes of the underlying statute; and
- a statement of whether the variance or waiver is permanent or temporary. If the variance or waiver is temporary, the petition shall include the dates indicating the duration of the requested variance or

A person requesting an emergency variance from or waiver of a SFWMD rule must clearly so state in the caption of the petition. In addition to the requirements of Section 120.542(5), Fla. Stat. pursuant to Rule 28-104.004(2), Fla. Admin. Code, the petition must also include:

- a) the specific facts that make the situation an emergency; and
- b) the specific facts to show that the petitioner will suffer immediate adverse effect unless the variance or waiver is issued by the SFWMD more expeditiously than the applicable timeframes set forth in Section 120.542, Fla. Stat.

#### **WAIVER OF RIGHTS**

Failure to observe the relevant time frames prescribed above will constitute a waiver of such right.

#### 28-106.201 INITIATION OF PROCEEDINGS

(INVOLVING DISPUTED ISSUES OF MATERIAL FACT)

- All petitions filed under these rules shall contain: (2)
- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the

course of the proceeding, and an explanation of how the petitioner's substantial interests will be affected by the agency determination;

- (c) A statement of when and how the petitioner received notice of the agency decision;
- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
- (e) A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief; and
  - (f) A demand for relief.

## 28-106.301 INITIATION OF PROCEEDINGS

(NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT)

- (2) All petitions filed under these rules shall contain:
- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding, and an explanation of how the petitioner's substantial interests will be affected by the agency determination;
  - (c) A statement of when and how the petitioner received notice of the agency decision;
- (d) A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief; and
  - (e) A demand for relief.

# 28-107.004 SUSPENSION, REVOCATION, ANNULMENT, OR WITHDRAWAL

- (3) Requests for hearing filed in accordance with this rule shall include:
  - (a) The name and address of the party making the request, for purposes of service;
- (b) A statement that the party is requesting a hearing involving disputed issues of material fact, or a hearing not involving disputed issues of material fact; and
- (c) A reference to the notice, order to show cause, administrative complaint, or other communication that the party has received from the agency.

# 42-2.013 REQUEST FOR REVIEW PURSUANT TO SECTION 373.114 OR 373.217

- (1) In any proceeding arising under Chapter 373, F.S., review by the Florida Land and Water Adjudicatory Commission may be initiated by the Department or a party by filing a request for such review with the Secretary of the Commission and serving a copy on any person named in the rule or order, and on all parties to the proceeding which resulted in the order sought to be reviewed. A certificate of service showing completion of service as required by this subsection shall be a requirement for a determination of sufficiency under Rule 42-2.0132. Failure to file the request with the Commission within the time period provided in Rule 42-2.0132 shall result in dismissal of the request for review.
- (2) The request for review shall identify the rule or order requested to be reviewed, the proceeding in which the rule or order was entered and the nature of the rule or order. A copy of the rule or order sought to be reviewed shall be attached. The request for review shall state with particularity:
- (a) How the order or rule conflicts with the requirements, provisions and purposes of Chapter 373, F.S., or rules duly adopted thereunder;
  - (b) How the rule or order sought to be reviewed affects the interests of the party seeking review;
- (c) The oral or written statement, sworn or unsworn, which was submitted to the agency concerning the matter to be reviewed and the date and location of the statement, if the individual or entity requesting the review has not participated in a proceeding previously instituted pursuant to Chapter 120, F.S., on the order for which review is sought;
- (d) If review of an order is being sought, whether and how the activity authorized by the order would substantially affect natural resources of statewide or regional significance, or whether the order raises issues of policy, statutory interpretation, or rule interpretation that have regional or statewide significance from a standpoint of agency precedent, and all the factual bases in the record which the petitioner claims support such determination(s); and
- (e) The action requested to be taken by the Commission as a result of the review, whether to rescind or modify the order, or remand the proceeding to the water management district for further action, or to require the water management district to initiate rulemaking to adopt, amend or repeal a rule.

## 28-107.005 EMERGENCY ACTION

- (1) If the agency finds that immediate serious danger to the public health, safety, or welfare requires emergency action, the agency shall summarily suspend, limit, or restrict a license.
- (2) the 14-day notice requirement of Section 120.569(2)(b), F. S., does not apply and shall not be construed to prevent a hearing at the earliest time practicable upon request of an aggrieved party.
- (3) Unless otherwise provided by law, within 20 days after emergency action taken pursuant to paragraph (1) of this rule, the agency shall initiate a formal suspension or revocation proceeding in compliance with Sections 120.569, 120.57. and 120.60, F.S.

#### 40E-1.611 EMERGENCY ACTION

- (1) An emergency exists when immediate action is necessary to protect public health, safety or welfare; the health of animals, fish or aquatic life; the works of the District; a public water supply, or recreational, commercial, industrial, agricultural or other reasonable uses of land and water resources.
- (2) The Executive Director may employ the resources of the District to take whatever remedial action necessary to alleviate the emergency condition without the issuance of an emergency order, or in the event an emergency order has been issued, after the expiration of the requisite time for compliance with that order.

DONE AND SO ORDERED, this 15 day of April, 1999, in West Palm Beach,

Florida.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT
BY ITS GOVERNING BOARD

Chairman

ATTEST:
By: Jasst. Secretary, Stums
On: Man II 1999

LEGAL FORM APPROVED

By: May 6 101

On: 4/1/69

FLORIDA WATER MANAGEMENT DISTRICT

BY DEPUTY CLERK

# **CERTIFICATE OF SERVICE**

HEREBY CERTIFY that the original of the foregoing has been hand-delivered to the Clerk of the South Florida Water Management District, 3301 Gun Club Road, MSC 0500, West Palm Beach, FL 33406, and that true and correct copies have been furnished by regular U.S. Mail this 12<sup>th</sup> day of May, 1999 to:

Alfred J. Malefatto, Esq. Teresa J. Moore, Esq. Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A. 777 South Flagler Drive Suite 300 East West Palm Beach, FL 33401

Terrell K. Arline, Esq. 1000 Friends of Florida Post Office Box 5948 Tallahassee, FL 32301

Charles F. Schoech, Esq. Caldwell & Pacetti 234 Royal Palm Way, Suite 300 Palm Beach, FL 33480

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