STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUMTER CITIZENS AGAINST IRRESPONSIBLE DEVELOPMENT, INC.; KENNETH ROOP; and AUBREY VARNUM,	)	
Petitioners,	)	
vs.	)	Case No. 02-1122
SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT and NORTH SUMTER UTILITY COMPANY,	)	
Respondents,	)	
and	)	
THE VILLAGES WATER CONSERVATION AUTHORITY, L.L.C.,	)	
Intervenor.	)	
SUMTER CITIZENS AGAINST IRRESPONSIBLE DEVELOPMENT, INC.; KENNETH ROOP; AUBREY VARNUM; and T. DANIEL FARNSWORTH,	)	
Petitioners,	)	
vs.	)	Case No. 02-1123
SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT and THE VILLAGES OF LAKE-SUMTER, INC.,	)	
Respondents.	)	

SUMTER CITIZENS AGAINST IRRESPONSIBLE DEVELOPMENT, INC.; KENNETH ROOP; and AUBREY VARNUM,	)	
Petitioners,	)	
vs.	)	Case No. 02-1124
SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT and THE VILLAGES OF LAKE-SUMTER, INC.,	)	
Respondents,	)	
and	)	
THE VILLAGES WATER CONSERVATION AUTHORITY, L.L.C.,	)	
Intervenor.	)	

RECOMMENDED ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings (DOAH) held a final hearing in the above-styled matter on May 20 through 22, 2002, in Bushnell, Florida. The following appearances were entered:

APPEARANCES

For Petitioners, Sumter Citizens Against Irresponsible Development, Inc., and T. Daniel Farnsworth:

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For Petitioners, Kenneth Roop and Aubrey Varnum:

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For Respondent, Southwest Florida Water Management District:

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For Respondent, The Villages of Lake-Sumter, Inc., and the Intervenors, North Sumter Utility Company, L.L.C., and The Villages Water Conservation Authority, L.L.C.:

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STATEMENT OF THE ISSUE

Whether proposed Water Use Permits Nos. 20012236.000 (the Potable Water Permit) and 20012239.000 (the Irrigation Permit) and proposed Environmental Resource Permit No. 43020198.001 (the ERP) should be issued by the Respondent, Southwest Florida Water Management District (the District).

PRELIMINARY STATEMENT

On August 31, 2001, North Sumter Utility Company, L.L.C. (the Utility), and The Villages Water Conservation Authority, L.L.C. (the Authority), simultaneously applied to the District for permits to withdraw groundwater to serve a portion of the

development known as The Villages of Sumter. On July 5, 2001, The Villages of Lake-Sumter, Inc. (the Villages Inc.), which is the general partner of both the Utility and the Authority, applied for a permit to construct a stormwater management system that would also serve a portion of The Villages of Sumter. Issuance of the Potable Water and Irrigation Permits are subject to the criteria contained in Rule 40D-2.301, Florida Administrative Code, while the issuance of the ERP is subject to those criteria set forth in Rules 40D-4.301 and 40D-4.302, Florida Administrative Code.

After initial application submittals and receipt of additional information and clarification from the applicants with regard to all three applications, the District issued notices of its proposed issuance, together with proposed permits on the following dates: the ERP on December 28, 2001; the Potable Water Permit on January 28, 2002; and the Irrigation Permit on January 29, 2002.

On February 22, 2002, Sumter Citizens Against Irresponsible Development, Inc. (SCAID), filed petitions challenging the District's proposed agency action on each of the three applications. The District entered orders dismissing the petitions, without prejudice, on February 28, 2002, and, on March 13, 2002, SCAID - now joined by Kenneth Roop, Aubrey Varnum, and T. Daniel Farnsworth - filed amended verified

petitions challenging the issuance of the permits. These amended petitions, although specifically brought pursuant to Section 403.412, Florida Statutes, also allege that the Petitioners will be substantially affected by the issuance of the permits.

Prior to transmittal of the proceedings to the Division of Administrative Hearings (DOAH), the District dismissed Farnsworth, with prejudice, from the two proceedings challenging issuance of the Potable Water and Irrigation Permits, as his petitions were untimely. The amended petitions of SCAID, Roop and Varnum and - as to Case No. 02-1123 only - Farnsworth were then forwarded to DOAH on March 19, 2002. After the petitions were received by DOAH, the Utility and the Authority filed motions to intervene and Respondent, the Villages Inc., moved to have all three proceedings consolidated. All three motions were granted and the consolidated proceeding was scheduled for hearing on May 20 through 23, 2002.

In the Prehearing Stipulation, the Petitioners allege that the rule criteria for issuance of the three permits have not been met, while the Villages Inc., the Utility, and the Authority (jointly "the Applicants") and the District assert that the applicable criteria have been met and, therefore, the Applicants are entitled to have the permits issued.

At the final hearing, the District and the Applicants jointly presented the testimony of three fact witnesses: John E. Parker, Jackson Sullivan, and Robert Farner. They also presented the testimony of five expert witnesses: Vivian Bielski, an expert in hydrology, geohydrology, and water use permitting; Kenneth Barrett, an expert in surface water management and environmental resource permitting; Leonard Bartos, an expert in limnology, wetlands delineation, wetlands mitigation, and environmental resource and water use permitting; John W. Parker, an expert in hydrology, geohydrology, and water use permitting; and Nicholas Andreyev, an expert in geotechnical engineering and geohydrology. In addition, the District and the Applicants offered into evidence 28 exhibits, all of which were admitted.

Petitioners offered the factual testimony of the three individual Petitioners: Roop, Farnsworth, and Varnum, as well as that of two other lay witnesses, William Clay Wing and Russell Weir. Petitioners also offered the expert testimony of Dr. Devo Seereeram, Ph.D., - an expert in hydrogeotechnical engineering, hydrology, and hydrogeology - and offered into evidence the deposition of Andreyev. Twelve (12) exhibits offered by Petitioners were admitted.

The parties jointly introduced five exhibits that were received into the record.

The Transcript of the final hearing was filed on May 24, 2002, and the parties filed their Proposed Recommended Orders ten days thereafter on June 3, 2002.

FINDINGS OF FACT

The Parties

1. The individual Petitioners, Farnsworth, Roop, and Varnum are all Florida citizens and residents of Sumter County.

2. None of the individual Petitioners offered any evidence relating to direct impacts that the ERP would have on their property. With respect to the Potable Water and Irrigation Permits, anecdotal testimony was presented by Petitioners and Wing and Weir relating to well failures and sinkholes in the area. Two Petitioners, Roop and Varnum, live in close proximity to the property encompassed by the three permits. Petitioner Farnsworth's property is approximately three and a half miles from the project boundary. Wing and Weir live approximately four and a half to five and 18 miles from the project site, respectively.

3. SCAID is a Florida not-for-profit corporation that has approximately 130 members. Farnsworth, the president of SCAID, identified only Roop and Varnum as members who will be directly affected by the activities to be authorized by the permits.

4. The District is the administrative agency charged with the responsibility to conserve, protect, manage, and control water resources within its boundaries.

5. The Utility and the Authority are limited liability companies, of which the Villages Inc. is the managing partner. The Villages Inc. is a Florida corporation. The Utility, which will serve as a provider of potable water, is regulated by the Public Service Commission, while the Authority which will provide irrigation water, is not.

The Villages Inc., Development

6. The Villages Inc. is a phased, mixed use, retirement community, which is located at the intersecting borders of Lake, Marion, and Sumter Counties. Development has been on going since at least 1983, with a current planning horizon of the year 2019.

7. Currently, there are 15,362 constructed dwelling units in the built-out portion of the Villages Inc. that are located in Lake County and the extreme northeast corner of Sumter County. The portion located in Marion County is 60 percent complete, with 750 homes completed and another 600 under construction. Approximately another 22,000 residences are planned for development in Sumter County by the year 2012, with an additional 10,200 by the year 2019. However, the Potable Water and Irrigation Permits are only for a six-year duration,

and the ERP has a duration of only six years. None of the permits authorize development activities beyond that time frame. Generally speaking, the three permits at issue include an area owned by the Villages Inc. that lies in northeast Sumter County South of County Road 466 and North of County Road 466A. However, it is not projected that this entire area will be built-out during the terms of three proposed permits.

Area Hydrology and Topography

8. In the area of the Villages Inc., there is a layer of approximately five to ten feet of sand at the land surface, which is underlain by ten to 70 feet of a clayey sand. Both of these constitute the surficial aquifer and are extremely leaky, allowing water to percolate easily through to a lower layer. Except in the vicinity of Lake Miona, there is no water in the surficial aquifer except after rainfall events.

9. The clayey sand layer is underlain by the Upper Floridan, a limestone unit. The top of this limestone layer ("the top of the rock") occurs at fluctuating depths of between 30 and 70 feet. At approximately 350 to 400 feet below the land surface, there begins a transition to a denser unit that serves as a confining layer between the Upper Floridan production zone and the Lower Floridan production zone. This confining layer, which was confirmed by drilling at three locations in the Villages Inc. is approximately 150 feet thick

in the area of the Villages Inc. Another transition, this time to a less dense formation, begins at approximately 550 to 600 feet, which is considered the top of the Lower Floridan production zone.

10. While testing conducted on the project site indicated almost no leakage between the Upper and Lower Floridan production zones, it is generally known by experts that there is some exchange of water between the two layers.

11. Both the Upper and the Lower Floridan contain water that meets potable water standards and both are considered water production zones. The water quality of the two zones is not significantly different.

12. The project area is prone to karst activity, that is, the formation of sinkholes. Sinkholes are formed as a result of the collapse of the overburden above subsurface cavities which have been formed through a very gradual dissolution of limestone, thus resulting in a "sink" at the land surface.

13. Surface water bodies in the area include Lake Miona, Black Lake, Cherry Lake, and Dry Prairie, as well as several other small wetlands.

The Potable Water and Irrigation Permits

14. The potable water permit is for the withdrawal from the Upper Floridan Aquifer of 1.164 million gallons of water per day (MGD), on an annual average, for potable use in residences

and both commercial and recreational establishments. It also limits the maximum withdrawal during peak months to 2.909 MGD.

15. The Irrigation Permit is for the withdrawal from the Lower Floridan Aquifer of 2.850 MGD, on an annual average, for use in irrigation. The peak month usage rate permissible under the proposed permit would be 9.090 MGD. Water withdrawal under the Irrigation Permit will be used for the irrigation of residential lawns, common areas, commercial landscaping, and golf courses.

Modeling of Drawdowns

16. In assessing the impacts of proposed water withdrawals from an aquifer, District personnel considered effects on the aquifers and on-surface water features in the area. Computer-generated models of the predicted effects of the Potable Water and Irrigation Permits withdrawals provided one of the principal bases for this assessment. The primary geologist assigned to review the permit applications reviewed two of the models submitted by the Utility and the Authority (jointly the WUP Applicants) and ran one personal model of her own in order to predict the effects of the proposed withdrawals on the aquifers, as well as on any wetlands and other surface water bodies. In particular, the models predict both the vertical and horizontal extent to which the withdrawals may lower the level of water

within the aquifers and in-surface waters under various conditions.

17. One of the models submitted by the WUP Applicants predicted drawdowns during a 90-day period of no rainfall while the other predicted the impacts of the withdrawals over the life of the permits, considered cumulatively with the effects of withdrawals from the already-existing Villages' development in Sumter, Marion, and Lake Counties. The District’s geologist modeled the impacts of the withdrawals over the life of the permits and included the cumulative effects of all of the current Villages' withdrawals in Sumter County. All of these models included the combined effects of both the proposed Potable Water and the Irrigation Permits.

18. Based upon these models, it is concluded that there will be no significant drawdowns as a result of the withdrawals authorized by the proposed water use permits. Specifically, the only predicted drawdown in the surficial aquifer (0.25 feet of drawdown) is in an area where there are no natural surface water features. Drawdown in the Upper Floridan is predicted at between 0.1 and 0.2 feet, while the drawdown in the Lower Floridan is predicted at a maximum of 1.5 feet. These minor drawdowns are not expected to cause any adverse impacts.

19. Transmissivity is the rate at which water moves horizontally through the aquifer. In areas with high

transmissivity, the results of water withdrawals from an aquifer will generally be low in magnitude, but broad in lateral extent. Water withdrawals from areas of low transmissivity will result in cones of depression that are more limited in lateral extent, but steeper vertically. The use of too high a transmissivity rate in a model, would overpredict the horizontal distance of the drawdowns caused by withdrawals, but would underpredict the vertical drawdown in the immediate vicinity of the withdrawal. Conversely, use of too low a transmissivity would over-predict the effects in the immediate vicinity of the withdrawal but underpredict the lateral extent of the drawdown.

20. The WUP Applicants' models used a transmissivity value for the Lower Floridan Aquifer of 100,000 feet squared per day ("$ft.^2/d$'). The WUP Applicants' consultant derived the transmissivity values from a regional model prepared by the University of Florida. The regional model uses a transmissivity value for the entire region of 200,000 $ft.^2/d$ for the Lower Floridan. While that transmissivity is appropriate for assessing large-scale impacts, on a more localized level, the transmissivity of the aquifer may be lower. Therefore, the WUP Applicants' consultant met with District representatives and agreed to use a value half that used in the University of Florida model. A similar approach was used for the

transmissivity value used in modeling effects in the Upper Floridan.

21. Notably, specific transmissivity values recorded in four wells in the Villages Inc. area were not used because two of these wells were only cased to a depth of just over 250 feet, with an open hole below that to a depth of 590 feet. Thus, the transmissivity measured in these wells reflect conditions in the confining layer at the immediate location of the wells - not the transmissivity of the Lower Floridan production zone. Further, site-specific information on transmissivity, measured during pump tests at individual wells, does not correlate well to the transmissivity of the aquifer, even at short distances from the well. Transmissivities measured at individual wells are used to determine the depth at which the pump should be set in the well, not to determine the transmissivity of the aquifer. Thus, the use of transmissivities derived from the regional model, but adjusted to be conservative, is entirely appropriate.

24. Moreover, using a transmissivity in her modeling of the project impacts of 27,000 $ft.^2/d$ for the Lower Floridan Aquifer, the district geologist’s model predicted no adverse impacts.

25. Leakance is the measure of the resistance of movement vertically through confining units of the aquifer. The leakance value used by the District for the confining layer between the

Upper and Lower Floridan was taken from the University of Florida model. Tests conducted on the site actually measured even lower leakance values. Thus, the evidence establishes that the leakance value used in the WUP Applicants' and the District's modeling for the Floridan confining layer was reasonable and appropriate.

26. Competent, substantial evidence also establishes that the leakance value used for Lake Miona was reasonable. The WUP Applicants submitted to the District substantial data, gathered over several years, reflecting the balance of water flowing into Lake Miona and the lake's levels in relation to the potentiometric surface. This documentation verified the leakance value used for Lake Miona in the modeling.

27. Finally, the District modeling used appropriate boundary condition parameters. The District modeling used what is known as the "constant head" boundary and assumes the existence of water generated off-site at the boundaries. Such a boundary simulates the discharge of the aquifer at a certain level. The use of constant head boundaries is an accepted practice.

28. The modeling conducted on behalf of the District and the Applicants provides a reasonable assurances that the Potable Water and Irrigation Permits will not cause adverse water quality or quantity changes to surface or groundwater resources,

will not cause adverse environmental impacts to natural resources, and will not cause pollution of the aquifer. Furthermore, because the predicted drawdowns are so insignificant, reasonable assurances have been provided that the withdrawals will not adversely impact existing off-site land uses or existing legal withdrawals. The modeling also provides reasonable assurances that the withdrawals will not be harmful to the water resources of the District.

29. Moreover, monitoring requirements included in the proposed Potable Water and Irrigation Permits provide additional reasonable assurance that – should the withdrawal effects exceed those predicted by the modeling – such effects are identified and necessary steps are taken to mitigate for any potential impacts. The District has reserved the right to modify or revoke all or portions of the water use permits under certain circumstances.

30. Specifically, the proposed Potable Water Permit requires a monitoring plan that includes the following pertinent provisions:

> b. There shall be no less than three control wetland and ten onsite wetland monitoring sites;
> c. A baseline monitoring report, outlining the current wetland conditions;

* * *

> e. A statement indicating that an analysis of the water level records for area lakes, including Miona Lake, Black Lake, Cherry Lake, Lake Deaton and Lake Griffin, will be included in the annual report;
> f. A statement indicating that an analysis of the spring flow records for Gum Spring, Silver Spring, and Fenney Spring, will be included in the annual report;
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> * * *
>
> i. Wildlife analyses for potentially impacted wetlands, lakes, and adjacent property owner uses or wells, including methods to determine success of the mitigation;
> j. A mitigation plan for potentially impacted wetlands, lakes, and adjacent property owner uses or wells, including methods and thresholds to determine success of the mitigation;
> k. An annual report of an analysis of the monitoring data . . . .

Similar provisions are included in the proposed irrigation permit. The WUP Applicants, in conjunction with the District, have developed sites and methodologies for this monitoring.

Reasonable Demand

31. The water to be withdrawn under the proposed Potable Water Permit will serve 10,783 people. This total results from the simple multiplication of the number of residences to be built during the next six years (5,675) by the average number of residents per household (1.9). Those numbers are based upon historical absorption rates within the Villages Inc. development

since 1983, an absorption rate that doubles approximately every five years.

32. The Utility proposed a per capita use rate of 108 gallons per day for potable use only. District personnel independently verified that per capita rate, based upon current usage in the existing portions of the Villages Inc. and determined that the rate was reasonable. Based upon the population projections and the per capita rate, the District determined that there is a reasonable demand for the withdrawal of the amount of water, for potable purposes, that is reflected in the Potable Water Permit.

33. The Utility has provided reasonable assurance regarding the Utility's satisfaction of this permitting criterion.

34. As to the irrigation permit, the Villages Inc. plans, within the next six years, to complete the construction of 1,911 acres of property that will require irrigation. The amount of water originally requested by the Authority for irrigation withdrawals was reduced during the course of the application process at the request of the District.

35. The District determined the reasonable amount of irrigation water needed through the application of AGMOD, a computer model that predicts the irrigation needs of various vegetative covers. Since the Authority intends to utilize

treated wastewater effluent as another source of irrigation water, the District reduced the amount of water that it would permit to be withdrawn from the Lower Floridan for irrigation. The District, thus, determined that the Authority would need 1.59 MGD annual average for recreational and aesthetic area irrigation and 1.26 MGD annual average for residential lawn irrigation, for a total of 2.85 MGD.

36. The Villages Inc. also plans to accumulate stormwater in lined ponds for irrigation use. However, unlike its treatment of wastewater effluent, the District did not deduct accumulated stormwater from the amount of water deemed necessary for irrigation. This approach was adopted due to the inability to predict short-term rainfall amounts.

37. The uncontroverted evidence of record establishes reasonable assurances that there is a reasonable demand for the amount of water to be withdrawn under the proposed irrigation permit.

Conservation and Reuse Measures

38. Both the Utility and the Authority applications included proposed measures for the conservation and reuse of water. The conservation plan submitted in conjunction with the irrigation permit application provides for control valves to regulate both the pressure and timing of irrigation by residential users; contractual restrictions on water use by

commercial users; xeriscaping; and an irrigation control system for golf course irrigation that is designed to maximize the efficient use of water. In addition, in the proposed permits, the District requires the Utility and the Authority to expand upon these conservation measures through such measures as educational efforts, inclined block rate structures, and annual reporting to assess the success of conservation measures.

39. The Authority also committed to reduce its dependence on groundwater withdrawals through the reuse of wastewater effluent, both from the on-site wastewater treatment facility and through contract with the City of Wildwood. Reasonable assurances have been provided that conservation measures have been incorporated and that, to the maximum extent practicable, reuse measures have been incorporated.

Use of Lowest Available Quality of Water

40. In addition to the reuse of treated wastewater effluent, the Authority intends to minimize its dependence on groundwater withdrawals for irrigation use through the reuse of stormwater accumulated in lined ponds. Thirty-one of the lined stormwater retention ponds to be constructed by the Villages Inc. are designed as a component of the irrigation system on-site. Ponds will be grouped with the individual ponds within each group linked through underground piping. There will be an electronically controlled valve in the stormwater pond at the

end of the pipe that will be used to draw out water for irrigation purposes.

41. These lined stormwater ponds serve several purposes. However, the design feature that is pertinent to the reuse of stormwater for irrigation is the inclusion of additional storage capacity below the top of the pond liner. No groundwater will be withdrawn for irrigation purposes unless the level of stormwater in these lined ponds drops below a designed minimum irrigation level. Groundwater pumped into these ponds will then be pumped out for irrigation. Thus, the use of groundwater for irrigation is minimized. The Authority has met its burden of proving that it will use the lowest quality of water available.

42. With respect to the potable permit, the evidence establishes that there are only minor differences between the water quality in the Upper Floridan and Lower Floridan in this area. The Upper Floridan is a reasonable source for potable supply in this area. Thus, reasonable assurances have been provided by the Utility that it will utilize the lowest water quality that it has the ability to use for potable purposes.

Waste of Water

43. In regard to concerns that the design of the Villages Inc.'s stormwater/irrigation system will result in wasteful losses of water due to evaporation from the surface of the lined ponds, it must be noted that there are no artesian wells

relating to this project and nothing in the record to suggest that the groundwater withdrawals by either the Utility or the Authority will cause excess water to run into the surface water system.

44. Additionally, the evidence establishes that, to the extent groundwater will be withdrawn from the Lower Floridan and pumped into lined stormwater ponds, such augmentation is not for an aesthetic purpose. Instead, the groundwater added to those ponds will be utilized as an integral part of the irrigation system and will be limited in quantity to the amount necessary for immediate irrigation needs.

45. Finally, the water to be withdrawn will be put to beneficial potable and irrigation uses, rather than wasteful purposes. Under current regulation, water lost from lined stormwater ponds through evaporation is not considered as waste. Thus, the Authority and the Utility have provided reasonable assurances that their withdrawals of groundwater will not result in waste.

The ERP

46. The stormwater management system proposed by the Villages Inc. will eventually serve 5,016 acres on which residential, commercial, golf course, and other recreational development will ultimately be constructed. However, the proposed permit currently at issue is preliminary in nature and

will only authorize the construction of stormwater ponds, earthworks relating to the construction of compensating flood storage, and wetland mitigation.

Water Quality Impacts

47. The stormwater management system will include eight shallow treatment ponds that will be adjacent to Lake Miona and Black Lake and 45 lined retention ponds. Thirty-one of these lined ponds will serve as part of the irrigation system for a portion of the Villages Inc.'s development. All of these ponds provide water quality treatment.

48. The unlined ponds will retain the first one inch of stormwater and then overflow into the lakes. The ponds provide water quality treatment of such water before it is discharged into the lakes. The water quality treatment provided by these ponds provides reasonable assurances that the project will not adversely impact the water quality of receiving waters.

49. While they do not discharge directly to surface receiving waters, the lined retention ponds do provide protection against adverse water quality impacts on groundwater. There will be some percolation from these ponds, from the sides at heights above the top of the liner. However, the liners will prevent the discharge of pollutants through the highly permeable surface strata into the groundwater. The Villages Inc. designed the system in this manner in response to concerns voiced by the

Department of Environmental Protection during the DRI process regarding potential pollutant loading of the aquifer at the retention pond sites. Furthermore, by distributing the accumulated stormwater - through the irrigation system - over a wider expanse of vegetated land surface, a greater degree of water quality treatment will be achieved than if the stormwater were simply permitted to percolate directly through the pond bottom.

50. There is no reasonable expectation that pollutants will be discharged into the aquifer from the lined ponds. If dry ponds were used, there would be an accumulation of pollutants in the pond bottom. These measures provide reasonable assurances that there will be no adverse impact on the quality of receiving waters.

Water Quantity Impacts

51. With regard to the use of lined retention ponds, as part of the Villages Inc.’s stormwater system and the impact of such ponds on water quantity, the evaporative losses from lined ponds as opposed to unlined ponds is a differential of approximately one (1) inch of net recharge. The acreage of the lined ponds - even measured at the very top of the pond banks - is only 445 acres. That differential, in terms of a gross water balance, is not significant, in view of the other benefits provided by the lined ponds.

52. As part of the project, wetlands will be created and expanded and other water bodies will be created. After rainfalls, these unlined ponds will be filled with water and will lose as much water through evaporation as would any other water body. The design proposed by the Villages Inc., however, will distribute the accumulated stormwater across the project site through the irrigation of vegetated areas.

53. The documentation submitted by the Villages Inc. establishes that the ERP will not cause adverse water quantity impacts. The Villages Inc. has carried its burden as to this permitting criterion.

Flooding, Surface Water Conveyance, and Storage Impacts

54. Parts of the project are located in areas designated by the Federal Emergency Management Administration (FEMA) as 100-year flood zones. Specifically, these areas are located along Lake Miona, Black Lake, between Black Lake and Cherry Lake, and at some locations south of Black Lake. Under the District's rules, compensation must be provided for any loss of flood zone in filled areas by the excavation of other areas. The District has determined, based upon the documentation provided with the Villages Inc.'s application, work on the site will encroach on 871.37 acre feet of the FEMA 100-year flood zone. However, 1,051.70 acre feet of compensating flood zone is being created.

56. The Villages Inc. proposes to mitigate for the loss of flood zone primarily in the areas of Dry Prairie and Cherry Lake. At present, Cherry Lake is the location of a peat mining operation authorized by DEP permit. Mining has occurred at that site since the early 1980s. The flood zone mitigation proposed by the Villages Inc. provides reasonable assurance that it will sufficiently compensate for any loss of flood basin storage.

57. The Villages Inc.'s project provides reasonable assurance that it will neither adversely affect surface water storage or conveyance capabilities, surface or groundwater levels or surface water flows nor cause adverse flooding. Each of the 45 retention ponds to be constructed on-site will include sufficient capacity, above the top of the pond liner, to hold a 100-year/24-hour storm event. This includes stormwater drainage from off-site. In addition, these ponds are designed to have an extra one foot of freeboard above that needed for the 100-year/24-hour storm, thus providing approximately an additional 100 acres of flood storage beyond that which will be lost through construction on-site.

58. Furthermore, the Villages Inc. has proposed an emergency flood plan. In the event of a severe flood event, excess water will be pumped from Dry Prairie, Cherry Lake, and Lake Miona and delivered to the retention ponds and to certain

golf course fairways located such that habitable living spaces would not be endangered.

Environmental Impacts and Mitigation

59. There are 601 acres of wetlands and surface waters of various kinds in the Villages Inc.'s project area. Forty-one acres of wetlands will be impacted by the work that is authorized under the ERP. Each of these impacted wetlands, along with the extent of the impact, is listed in the ERP. The impacts include both fill and excavation and all will be permanent.

60. When assessing wetland impacts and proposed mitigation for those impacts, the District seeks to ensure that the activities proposed will not result in a net loss of wetland functionality. The object is to ensure that the end result will function at least as well as did the wetlands in their pre-impact condition. Functional value is judged, at least in part, by the long term viability of the wetland. While small, isolated wetlands are not completely without value, large wetland ecosystems – which are less susceptible to surrounding development – generally have greater long-term habitat value. The District's policy is that an applicant need not provide any mitigation for the loss of habitat in wetlands of less than 0.5 acre, except under certain limited circumstances, including

where the wetland is utilized by threatened or endangered species.

61. Some wetlands that will be impacted by the Villages Inc.'s project are of high functional value and some are not as good. The Villages Inc. proposes a variety of types of mitigation for the wetlands impacts that will result from its project, all of which are summarized in the ERP. In all, 331.55 acres of mitigation are proposed by the Villages Inc.

62. First, the District proposes to create new wetlands. Approximately 11 acres of this new wetland will consist of a marsh, which is to be created east of Cherry Lake. Second, it proposes to undertake substantial enhancement of Dry Prairie, a 126-acre wetland. Currently – and since at least the early nineties – Dry Prairie received discharge water from the peat mining operation at Cherry Lake. Without intervention, when the mining operations stop, Dry Prairie would naturally become drier than it has been for several years and would lose some of the habitat function that it has been providing. The Villages Inc.'s proposed enhancement is designed to match the current hydroperiods of Dry Prairie, thus ensuring its continued habitat value.

63. Third, the Villages Inc. has proposed to enhance upland buffers around wetlands and surface waters by planting natural vegetation, thus providing a natural barrier. Placement

of these buffers in conservation easements does not provide the Villages Inc. with mitigation credit, since a 25-foot buffer is required anyway. However, the District determined that the enhancement of these areas provided functional value to the wetlands and surface waters that would not be served by the easements alone.

64. Fourth, the Villages Inc. will place a conservation easement over certain areas, including a 1500-foot radius preserve required by the Fish and Wildlife Conservation Commission (FWCC) around an identified eagles' nest. These areas will also be used for the relocation of gopher tortoises and, if any are subsequently located, of gopher frogs. While the Villages Inc. is also performing some enhancement of this area, it will receive no mitigation credit for such enhancement – which was required to meet FWCC requirements. However, since the conservation easement will remain in effect in perpetuity, regardless of whether the eagles continue to use the nest, the easement ensures the continued, viability of the area's wetlands and provides threatened and endangered species habitat.

65. In order to provide additional assurances that these mitigation efforts will be successful, the District has included a condition in the proposed permit establishing wetland mitigation success criteria for the various types of proposed

mitigation. If these success criteria are not achieved, additional mitigation must be provided.

66. With the above described mitigation, the activities authorized under the ERP will not adversely impact the functional value of wetlands and other surface waters to fish or wildlife. The Villages Inc. has met its burden of providing reasonable assurances relating to this permit criterion.

Capability of Performing Effectively

67. The Villages Inc. has also provided reasonable assurances that the stormwater management system proposed is capable of functioning as designed. The retention ponds proposed are generally of a standard-type design and will not require complicated maintenance procedures.

68. In its assessment of the functional capability of the system, the District did not concern itself with the amount of stormwater that the system might contribute for irrigation purposes. Rather, it focused its consideration on the stormwater management functions of the system. The question of the effectiveness of the system for irrigation purposes is not relevant to the determination of whether the Villages Inc. has met the criteria for permit issuance. Consequently, the record establishes that the documentation provided by the Villages Inc. contains reasonable assurances that the stormwater system will function effectively and as proposed.

Operation Entity

69. The Villages Inc. has created Community Development District No. 5 (CDD No. 5), which will serve as the entity responsible for the construction and maintenance of the stormwater system. CDD No. 5 will finance the construction through special revenue assessment bonds and will finance maintenance through the annual assessments. Similar community development districts were established to be responsible for earlier phases of the Villages Inc.

70. The ERP includes a specific condition that, prior to any wetlands impacts, the Villages Inc. will either have to provide the District with documentation of the creation of a community development district or present the District with a performance bond in the amount of $1,698,696.00. Since the undisputed testimony at hearing was that CDD No. 5 has, in fact, now been created, there are reasonable assurances of financial responsibility.

Secondary and Cumulative Impacts

71. The Villages Inc.'s application also provides accurate and reliable information sufficient to establish that there are reasonable assurances that the proposed stormwater system will not cause unacceptable cumulative impacts upon wetlands or other surface waters or adverse secondary impacts to water resources. The system is designed in a manner that will meet water

treatment criteria and there will be no secondary water quality impacts. Further, the use of buffers will prevent secondary impacts to wetlands and wetland habitats and there will be no secondary impacts to archeological or historical resources. In this instance, the stormwater system proposed by the Villages Inc. will function in a manner that replaces any water quantity or water quality functions lost by construction of the system.

72. In its assessment of the possible cumulative impacts of the system, the District considered areas beyond the bounds of the current project, including the area to the south that is currently being reviewed under the DRI process as a substantial deviation. The District's environmental scientist, Leonard Bartos, also reviewed that portion of the substantial deviation north of County Road 466A, in order to determine the types of wetlands present there. Furthermore, the District is one of the review agencies that comments on DRI and substantial deviation applications. When such an application is received by the District's planning division, it is routed to the regulatory division for review. The District includes its knowledge of the DRIs in its determination that there are no cumulative impacts. Reasonable assurances have been provided as to these permitting criteria.

Public Interest Balancing Test

73. Because the proposed stormwater system will be located in, on, and over certain wetlands, the Villages Inc. must provide reasonable assurances that the system will not be contrary to the public interest. This assessment of this permitting criteria requires that the District balance seven factors. While the effects of the proposed activity will be permanent, the Villages Inc. has provided reasonable assurances that it will not have an adverse impact on the public health, safety, or welfare; on fishing or recreational values; on the flow of water; on environmental resources, including fish and wildlife and surface water resources; or on off-site properties. Furthermore, the District has carefully assessed the current functions being provided by the affected wetland areas. With respect to historical or archeological resources, the Villages Inc. has received letters from the Florida Department of State, Division of Historical Resources, stating that there are no significant historical or archeological resources on the project site that is the subject of this permit proceeding.

74. Thus, the evidence establishes reasonable assurances that the Villages Inc.'s stormwater system will not be contrary to the public interest. Additionally, the District and Applicant presented uncontroverted evidence that the proposed project will not adversely impact a work of the District, and

that there are no applicable special basin or geographic area criteria.

CONCLUSIONS OF LAW

75. The Division of Administrative Hearings has jurisdiction of the subject matter pursuant to Section 120.57, Florida Statutes.

76. None of the individual petitioners have established that they are substantially affected parties. In addition, the president of SCAID has testified that only two of its 130 members will be directly affected by the project. Nonetheless, each of the Petitioners – including SCAID - is a citizen of Florida and, therefore, has standing to intervene in these permitting proceedings pursuant to Section 403.312, Florida Statutes. Such intervention includes the right to petition for a hearing under Sections 120.569 and 120.57, Florida Statutes.

77. This is a de novo proceeding intended to formulate final agency action. Department of Transportation v. J.W.C., Inc., 396 So. 2d 778, 786-87 (Fla. 1st DCA 1981). Applicants have the burden of convincing the fact-finder, by preponderance of the evidence, that the criteria for permitting have been satisfied. Save Anna Marina, Inc. v. Department of Transportation, 700 So. 2d 113, 116 and 117 (Fla. 2d DCA 1997) (citing J.W.C). To carry the initial burden, applicants must present a prima facie case, based on credited and credible

evidence of its entitlement to a permit. County Line Coalition, Inc. v. Southwest Florida Water Management District, ER FALR ’99:165 at 6 (SWFWMD 4/27/99). Accord Lee v. St. Johns River Water Management Dist., ER FALR ’99:353 at 21 (SJRWMD 9/24/99).

78. "The applicant’s burden is one of reasonable assurances, not absolute guarantees." Lee, ER FALR ‘99:353 at 21. "'Reasonable assurance' contemplates a substantial likelihood that the project will be successfully implemented. . . ." In the context of potential for harm of natural resources, Florida courts have allowed agencies flexibility in interpreting "reasonable assurances" and in applying individual permit standards based on a totality of circumstances. . . . Fulford v. Southwest Florida Water Management District, ER FALR ’00:102 at 6 (SWFWMD 12/14/99)

79. As a general proposition, a party should be able to anticipate that when agency employees or officials having special knowledge or expertise in the field accept data and information supplied by the applicant, the same data and information, when properly identified and authenticated as accurate and reliable by agency or other witnesses, will be readily accepted by the hearing officer, in the absence of evidence showing its inaccuracy or unreliability. J.W.C., 396 So. 2d at 789. Accord Merrill Stevens Dry Dock Co. v. G. and J. Investors, 506 So. 2d 30 (Fla. 3d DCA 1987).

80. Once an applicant has presented a prima facie case, the burden of going forward with contrary evidence shifts to the parties opposing the issue of the permit. J.W.C., 396 So. 2d at 789; County Line Coalition, ER FALR ’99:353 at 6. Absent a presentation by the opponents of contrary evidence, equivalent in quality to that presented by the applicant, the permit must be issued. Id. "The applicant is not required to eliminate all contrary possibilities or address impacts which are only theoretical and could be measured in real life." Fulford, ER FALR 00:102 at 6. Accord Lee, ER FALR ’99:353 at 12 (an opponent’s burden cannot be met by way of presentation of mere speculation of what "might" occur).

81. The permitting criteria relevant to the issuance of a water use permit by the District are set forth in Rule 40D-2.301, Florida Administrative Code, and are expanded upon in the Basis for Review for Water Use Permit Applications (the WUP Basis for Review).[1] The Utility and the Authority have carried their burden, having presented accurate and reliable information that has been identified and authenticated by the District. The Petitioners failed to present equivalent evidence to the contrary.

82. Petitioners’ assertions that the proposed water use permits will cause water to go to waste reflects a misunderstanding of that permitting criterion. Section 4.12 of

the WUP Basis of Review states that "[w]ater withdrawals must not result in the waste of water, as defined in Rule [sic] 373.203(4)."[2] Waste is the causing of excess water to run into a surface water system, unless the water is thereafter put to beneficial use." The Basis of Review further states specifically that the withdrawal of water for augmentation of a water body is permissible if the water body thus augmented for a beneficial use such as golf course irrigation and if the quantity of water withdrawn is limited to that needed for such use.

83. Since the Petitioners have not presented contrary evidence of equivalent quality to that presented by the Respondents, the Utility and the Authority have met their burden of proving, by a preponderance of the evidence, that their water use permits will meet all of the permitting criteria. To the extent that the Petitioners seek to have the permits denied, based upon unadopted objectives or unwritten policies, such considerations are not relevant to the permitting decisions at hand. "The issuance of a SWMS [SWFWMD] permit must be based solely on compliance with applicable permit criteria." Driscoll v. Southwest Florida Water Management District, ER FALR '02:032 at 3 (SWFWMD 11/24/01), citing Council of the Lower Keys v. Toppino, 429 So. 2d 67 (Fla. 3d DCA 1983). See also Save the St. Johns River v. St. Johns River Water Management District,

623 So. 2d 1193, 1205 (Fla. 1st DCA 1993) (in the absence of an applicable permitting rule or the requisite showing under Section 120.57(1)(e), Florida Statutes, of an enforceable unadopted rule, consistency with agency objectives is not a criterion for permit issuance).

84. Similarly, the Villages Inc. together with the District, presented a prima facie case satisfying all of the permitting criteria for issuance of the ERP. Those criteria are found at Rules 40D-4.301 and 40D-4.302, Florida Administrative Code, and are expanded upon in the Basis of Review for Environmental Resource Permit Applications within the Southwest Florida Water Management District ("ERP Basis of Review").[3] As is clear from the Findings of Fact, the Villages Inc. has satisfied each of the permitting criteria, only a few of which require some consideration in these conclusions of law.

85. Section 2.6.1 identifies the entities or persons that will be considered acceptable to satisfy the requirement that a proposed stormwater system is capable of being effective in performance and functioning as proposed and that the activity being permitted will be conducted by an entity with the financial, legal, and administrative capabilities to ensure the permit conditions will be met. See Rule 40D-4.301(1)(i) and (j), Florida Administration Code (stating those permitting criteria). Included among those acceptable entities are

community development districts. Section 2.6.1.(b), ERP Basis for Review. Since the record establishes that the Villages Inc. intends that responsibility for construction and maintenance of the stormwater system will be transferred to CDD No. 5, these two permitting criteria have been satisfied.

86. The ERP Basis of Review also provides clarification of the permitting criteria relating to the assessment of potential flooding and water quantity impacts. For example, it provides that encroachments into the flood plain of 100-year storm event must be replaced with compensating storage capacity. The Villages Inc. has satisfied this requirement.

87. The ERP states that "[w]here practicable, systems shall be designed to: . . . preserve site groundwater recharge characteristics." While the Petitioners argue that this provision will be violated by the Villages Inc.'s use of lined retention ponds, the preponderance of the evidence does not support that position. Moreover, as indicated, there are counterbalancing benefits to the lined ponds that make their elimination from the proposed system "not practicable."

88. With respect to wetlands impacts, the ERP Basis for Review states:

> Wetlands are important components of the water resources because they often serve as spawning, nursery and feeding habitats for many species of fish and wildlife, and because they often provide important flood

> storage, nutrient cycling, detrital production, recreational and water quality functions. . . Not all wetlands or other surface waters provide all of these functions, nor do they provide them to the same extent. . . .
>
> It is the intent of the Governing Board that the criteria in subsections 3.2 through 3.3.8 [of the ERP Basis of Review] be implemented in a manner which achieves a programmatic goal and a project permitting goal of no net loss of wetlands or other surface water functions . . . Unless exempted by statute or rule, permits are required for the construction, alteration, operation, maintenance, abandonment and removal of systems so that the District can conserve the beneficial functions of these communities.

Section 3.1.0., ERP Basis of Review (emphasis supplied). Clearly, the District does not intend this requirement to mandate that there be no net loss of wetland acreage. Rather, it is the preservation of equivalent wetland functions that is the goal. The Villages Inc. has satisfied this requirement.

89. The ERP Basis of Review also provides assistance in construction of the permitting criteria relating to cumulative impacts. Section 3.2.8 states that, in assessing whether unacceptable cumulative impacts will occur, consideration must be given to activities which are under review, approved, or vested pursuant to Section 380.06, Florida Statutes (the DRI statute), or other activities regulated under Part IV, Chapter 373, Florida Statutes, which may reasonably be expected

to be located within wetlands or other surface waters in the same drainage basin.

90. The Villages Inc. has provided the District with uncontroverted evidence regarding the potential for cumulative impacts, including information relating to areas currently under DRI review. The District has accepted that information as accurate and reliable and has relied upon it as the basis for its conclusion that there will be no cumulative impacts. Thus, the Villages Inc. has satisfied this permit criterion as well.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is:

RECOMMENDED that a final order be entered issuing Water Use Permit Nos. 20012236.000 and 20012239.000 and Environmental Resource Permit No. 43020198.001, in accordance with the District's proposed agency action.

DONE AND ENTERED this 24th day of June, 2002, in Tallahassee, Leon County, Florida.

DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of June, 2002.

ENDNOTES

1/ The WUP Basis for Review has been adopted by reference in Rule 40D-2.091, Florida Administrative Code.

2/ Notably, Section 373.203(4), Florida Statutes, narrowly defines waste as limited to flows of water from artesian wells.

3/ The ERP Basis for Review has been adopted by reference in Rule 40D-4.091(1), Florida Administrative Code. While the current edition of that document was not incorporated into SWFWMD's rules until February 27, 2002, there has been no suggestion that the current edition includes substantive changes that are significant to the consideration of The Villages Inc.'s application.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.