

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: PETITION FOR RULE)
CREATION - COCOHATCHEE) Case No. 02-4356
COMMUNITY DEVELOPMENT DISTRICT.)
_____)

ADMINISTRATIVE LAW JUDGE'S REPORT TO
THE FLORIDA LAND AND WATER ADJUDICATORY COMMISSION

Pursuant to Section 190.005(1)(d), Florida Statutes,
J. Lawrence Johnston, Administrative Law Judge (ALJ) of the
Division of Administrative Hearings (DOAH), conducted a local
public hearing, in Bonita Springs, Florida, on January 22, 2003.

APPEARANCES

For Petitioner: Kenza van Assenderp
Young, van Assenderp,
Varnadoe & Anderson, P.A.
225 South Adams Street, Suite 200
Tallahassee, Florida 32301

STATEMENT OF THE "ISSUE"

At "issue" in this hearing was the Petition for Rulemaking
to Establish a Uniform Community Development District, dated
October 10, 2002 (Petition). The Petition, filed by Beach Road
Development Company L.L.C., requested that the Florida Land and
Water Adjudicatory Commission (FLWAC) adopt a rule to establish
a state-chartered uniform community development district, to be
called the Cocohatchee Community Development District, on
certain property in Lee County, Florida. The hearing was for

purposes of gathering information in anticipation of quasi-legislative rulemaking by FLWAC.

PRELIMINARY STATEMENT

After the Petition was filed, a local public hearing was duly scheduled, noticed, advertised, and held in Bonita Springs, Florida, on January 22, 2003. At the hearing, Petitioner presented five witnesses, whose names and addresses are listed in Appendix A to this Report, and had two exhibits admitted into evidence: Petitioner's Exhibit 1, a print-out copy of an e-mail from Assistant Lee County Attorney, Dawn Perry-Lehnert, indicating that she would not be participating in the hearing because her client, the Lee County Board of County Commissioners, adopted a resolution in support of establishment; and Petitioner's Pre-hearing Statement and Composite Exhibit 2, A through L. These exhibits are more fully described in Appendix B to this Report.

The Transcript of the local public hearing was filed on February 4, 2003. Petitioner filed a Proposed Report to FLWAC, which is essentially adopted and incorporated into this Report. References in the Report to "Tr." are to the cited page of the Transcript. References to "Q." are to the cited question and answer contained in that witness's prepared testimony.

SUMMARY OF RECORD

A. The Petition

1. A copy of the Petition was filed with Lee County, along with a \$15,000 filing fee, on September 27, 2002. On October 10, 2002, the Petition was filed with FLWAC.

2. The Petition (Petitioner's Composite Exhibit 2, B-1 through B-8) invokes the statutory charter created by the Legislature in Sections 190.006-190.046, Florida Statutes (2001), as amended, and requests establishment of the Cocohatchee Community Development District (the District or CDD) on 1,298 acres, more or less, in unincorporated Lee County, Florida, bounded on the north by unincorporated Lee County, on the east and south by the Lee County line, and on the west by a section of land undergoing review for a residential planned development. Petitioner's Exhibit 2 gives a metes and bounds description of the proposed Cocohatchee CDD.

3. The property within the proposed boundary of the District and established thereon contains no enclaves.

4. The Petition alleges that the owners of all of the proposed real property to be included in the CDD have given written consent to the establishment of the Cocohatchee CDD. Exhibit 3 to the Petition contains documentation constituting written consent of the owners of one hundred percent (100%) of the property to be included.

5. The Petition names the five persons to be appointed by the rule to serve as members of the initial Board of Supervisors until replaced by elected members.

6. The Petition identifies the major trunk waterlines, sewer interceptors, and outfalls on the proposed property to be serviced by the CDD. Exhibit 4 to the Petition depicts the location of these public facilities.

7. The Petition sets forth in Exhibit 5 a proposed timetable and schedule of estimated costs for the construction of the proposed facilities. Total costs projected for the construction period of six years are \$56,638,000.00 for water management, right-of-way (ROW) improvements, perimeter landscaping, wetland mitigation, and offsite improvements.

8. The Petition alleges its Exhibit 6-A is the future land use map of the Lee County Comprehensive Plan. The land area within the proposed District is designated "Rural Wetlands." Exhibit 6-C attached to the Petition is a letter from the Department of Community Affairs (DCA) determining that the Lee County Comprehensive Plan is in compliance. Exhibit 6-D attached to the Petition is DCA's Notice of Intent.

9. The Petition includes Exhibit 7, which is a Statement of Estimated Regulatory Costs.

10. The Petition alleges that Petitioner paid \$15,000 to Lee County on September 27, 2002, as filing fees (Petitioner's Composite Exhibit 2, C).

B. Local Hearings

11. On January 14, 2003, the state-chartered Lee County Commission held an optional local public hearing under Section 190.005(1)(c), Florida Statutes, concerning establishment of the state-chartered CDD on the proposed property. At the conclusion of the optional local public hearing, Lee County adopted and filed a resolution in support of the CDD, Lee County Resolution 03-01-25 (Petitioner's Composite Exhibit 2, D).

12. All procedural requirements for transmittals and notice were met, as set forth in Petitioner's Composite Exhibit 2, D - H. Petitioner duly advertised the local public hearing to be conducted by DOAH on January 22, 2003, in an appropriate local newspaper in the four weeks immediately prior to the local public hearing. Publication dates were December 24 and 31, 2002, and January 7 and 14, 2003, as confirmed by the newspaper affidavit and copies of tear sheets, Petitioner's Composite Exhibit 2, H.

13. The DOAH hearing was commenced ten minutes after the noticed and scheduled time in order to give any persons who wanted to attend, as a result of the notice, ample time to attend before the hearing began (Tr. 1).

14. John Gleeson, vice president of Resource Conservation Properties, which is Petitioner's managing member, testified that the approximately 1,280 acres proposed for the District are located about 4 and 1/2 miles east of I-75 at the Bonita Beach Road interchange surrounded by preserve to the south and the east and a future preserve to the north and by agricultural and future development of another landowner to the west. Currently, the land is about 90 percent in tomato row-crop production, and it is anticipated to develop approximately 1,200 units and 36 holes of golf on the project. Gleeson then testified that in working with the South Florida Water Management District (SFWMD) in getting the appropriate permit, the landowner-developer provided two flow-ways for SFWMD to use to reestablish the Cocohatchee Drainage Basin Water Flow-Way. The purpose is to drain water from the preserve eventually down to the Cocohatchee Drainage Basin and into the Cocohatchee River in the neighboring county, Collier County (Tr. 5-6). Gleeson stated that the name of the project is not yet determined but that, as a result of the Flow-Way, the District was named the Cocohatchee CDD. He estimated that site work would commence later this year with sales for the end of the year. Gleeson testified further that the District will help acquire and manage assets primarily composed of the parts of the SFWMD Flow-Way and the lakes on site, as well as constructed road access to the adjacent

sections (Tr. 6). Gleeson then reviewed and authenticated Petitioner's Pre-hearing Statement and Composite Exhibit 2 (Tr. 3) for receipt in evidence. Gleeson then described the other witnesses of the Petitioner's team who were present and the responsibilities assigned to each team member (Tr. 7).

Thereafter, Gleeson testified that basic utilities will be provided by the development company, privately funded (Tr. 13).

15. Carey Garland was the next witness. He was tendered and accepted as an expert witness authorized and capable of rendering opinion testimony about the delivery and financing of different types of infrastructure and maintenance so as to enable him to prepare and render opinions about a Statement of Estimated Regulatory Costs. Garland testified that he prepared the required Statement of Estimated Regulatory Costs in Exhibit 7 to the Petition (Petitioner's Composite Exhibit 2, B). He then summarized the focus of a Statement of Estimated Regulatory Costs as being the costs to various local and state agencies and other private entities from the District government being established, as listed under Section 120.54, Florida Statutes. He then testified that he had applied these statutory requirements to the Cocohatchee District and did not discover any unusual problem or matter that needed to be pointed out to the ALJ, or to the Governor and members of the Cabinet (Tr. 15-17).

16. The next witness was Robert D. Hutcherson, a planner with the firm of WilsonMiller, Inc., who was tendered and accepted as an expert capable of rendering expert opinion testimony about the planning aspects of establishing a community development district as an alternative mechanism to deliver infrastructure (Tr. 23). Hutcherson testified that he applied the six factors in Section 190.005(1)(e), Florida Statutes, from his perspective as a planner. As to factor one, he stated that the Petition from his perspective was true and correct. As to factor two, he stated that he had reviewed both the state plan and the Lee County Comprehensive Plan and found establishment of the District not to be inconsistent with either. Regarding factor three, he found the land area to be sufficiently compact and contiguous and of sufficient size to be developable as one functional inter-related community. Regarding factor four, he determined that the District would be the best alternative to deliver the community development services and facilities. Regarding factor five, he found that there would be no incompatibility with the capacity and uses of local and regional community development services and facilities; regarding factor six, he determined that the land area is amenable to separate special district government (Tr. 24-25). He adopted Petitioner's Composite Exhibit 2, K, the planning "white paper" he prepared which details his opinions (Tr. 23). He then

testified that he had not discovered any unusual problem or matter that needed to be disclosed or brought to the attention of the ALJ, or to FLWAC, which he stated was his primary purpose for applying the six statutory factors in order to see if there were anything he could discover that should be reported (Tr. 25-26).

17. The next witness was Joshua R. Evans, who was tendered and accepted as an expert Board Certified Engineer capable of rendering opinion testimony about alternative delivery of basic infrastructure for community development (Tr. 27-28). Evans then testified that he had prepared Petitioner's Composite Exhibit 2, K, the engineering "white paper," which reviewed each factor listed in Section 190.005(1)(e), Florida Statutes, from the perspective of any special engineering problems that are related to District establishment (Tr. 28). As to the first factor, he found the Petition to be correct and that there were no special engineering problems evident from his review (Tr. 28-29). He then discussed the second factor, finding no problems or places in the legal description that would cause problems so that there were no special engineering problems with regard to consistency with the state plan (Tr. 29). He then discussed the third factor and found that there were no special engineering problems and that the land area was of sufficient size, contiguity, and compactness (Tr. 29). Believing it logical to

go next to factor six, he determined that the land area is amenable for special district governance and that there were no existing land features, facilities, encumbrance, or restrictions that would make services or special utilities of the District difficult to provide, so that there were no special engineering problems evident during his review (Tr. 29-30). Believing it logical to go next to factor five, he determined that the District would not be incompatible with any existing community development district systems, facilities, or services, and with any authorized, and that there were no special engineering problems evident comparing that to the District (Tr. 30). He concluded with factor four and determined that the District is the best alternative (Tr. 30). He then summarized all of his testimony to the effect that he had determined no special problem or unusual situation to bring to the attention of the Judge, or the Governor and members of the Cabinet (Tr. 30).

18. The next witness was Jim Ward, vice president of Operations, Severn Trent Services, which has managed over 140 community development districts, of which Ward has handled about 40 personally (Tr. 31). He then responded to a variety of questions regarding his experience and capabilities in managing Districts and in working with landowners on alternative ways to provide infrastructure, both management and financing aspects, and distinguishing the District as a special purpose local

government from general purpose local governments and related matters (Tr. 31-34). Ward was then tendered and accepted as an expert capable of rendering opinion testimony about the CDD as an alternative way to provide infrastructure, the management of that alternative, and the various financing aspects that attend to that alternative (Tr. 34). Ward then testified that he is familiar with the land area proposed for establishing the District, that he had worked with Gleeson, Garland, the engineer, and the planner on this establishment Petition. Ward then testified that he was not aware of any particular problems or concerns he would face about his ability to manage the District if it is established on the property and that there is nothing he would deem important enough that would require being pointed out to the ALJ with regard to any problem in establishment and operation of this District (Tr. 34-35). In response to a question from the Administrative Law Judge, Ward explained that he forms his initial feeling about whether a proposed development is operated better under a CDD, as opposed to any other method, by first reviewing the location, continuity of ownership of the property itself, and what the ultimate land-use will be. He then looks at the kinds of amenities to be constructed within the property that would be required to be operated by a government entity, the provision of long-term infrastructure services and the management of those services

(Tr. 35-36). He then contrasted the location of Cocohatchee with property in a downtown area, where it might be better in a redevelopment study to use a community redevelopment agency or some sort of other kind of alternative; he stated further that he would look at the size of the government itself and the nature and value that the amenities the developer proposes to provide for its residents so that from there he can make a determination whether a municipal agency, a dependent district, or an independent district, in this case a community development district, is best. Finally, he thought the District on this proposed property would request at least optional park and security powers (Tr. 36-37). As to security powers, he stated that the District can enter into an interlocal agreement with the applicable county or city police function (Tr. 37). Ward then stated that a number of the Districts he manages have agreements with the local police department or the sheriff's office to provide additional services within the District boundary, ranging from police officers for specified services to directing patrol for specific areas to include 365, seven-day-a-week coverage, or related options. He also said that districts may use private security services for such things as manning a guard house or watching over facilities or something of that nature and that the District does not have pure police power, power to issue tickets and fine and arrest people but rather

enters into agreements with a local enforcement department for such a function (Tr. 37-38).

19. With reference to Petitioner's Exhibit 1, no one from Lee County was present. But, as indicated, Petitioner's Composite Exhibit 2, D, constitutes the Resolution of the Board of County Commissioners of Lee County in support of establishment of the District.

20. The ALJ polled the audience and determined that no one had appeared in response to the notice other than the Petitioner and its staff (Tr. 2). This fact remained consistent through to the termination of the hearing so that there were no questions, evidence, or testimony from anyone else because no one was present. The local public hearing was concluded at 2:00 p.m.

APPLICABLE LAW

A. General

21. Under Section 190.003(6), Florida Statutes, a "community development district" is a local unit of special-purpose government which is created pursuant to this act and limited to the performance of those specialized functions authorized by this act; the boundaries of which are contained wholly within a single county; the governing head of which is a body created, organized, and constituted and authorized to function specifically as prescribed in this act for the delivery of urban community development services; and the formation,

powers, governing body, operation, duration, accountability, requirements for disclosure, and termination of which are as required by general law.

22. Section 190.011, Florida Statutes, enumerates the general powers of CDDs. These general powers are to enable the District to exercise its single specialized narrow growth management purpose. State v. Frontier Acres Community Development District, 472 So. 2d 455 (Fla. 1985). They include the powers to organize itself, to hire contract with consultants, to have a seal, to sue and be sued, and related governmental powers.

23. Section 190.012, Florida Statutes, lists special powers of CDDs. Subject to the regulatory power of all applicable government agencies, CDDs may plan, finance, acquire, construct, enlarge, operate, and maintain systems and facilities for water management; water supply, sewer, and wastewater management; district roads meeting minimum county specifications; and certain projects within or without the district pursuant to development orders from local governments. After obtaining the consent of the applicable local general purpose government, a CDD may have the same powers with respect to using the following "optional" systems, facilities, and services already granted to the District by its general law charter: parks and recreation, fire prevention, school

buildings, security, mosquito control, and waste collection and disposal.

24. Section 190.005(1), Florida Statutes, provides that the sole means for establishing a community development district of 1,000 acres or more shall be by rule adopted by FLWAC granting a petition for the establishment of a CDD. (Section 190.005(2) provides that, for CDDs on proposed property of less than 1,000 acres, the county in which the proposed CDD is to be situated may establish a CDD under the same requirements discussed below.)

25. Section 190.005(1)(a), Florida Statutes, requires that the petition be filed with FLWAC and submitted to the County. The petition must describe by metes and bounds the area to be serviced by the CDD with a specific description of real property to be excluded from the district. The petition must set forth that the petitioner has the written consent of the owners of all of the real property proposed to be in the CDD, or has control by "deed, trust agreement, contract or option" of all of the real property. The petition must designate the five initial members of the board of supervisors of the CDD and the District's name. The petition must contain a map showing current major trunk water mains and sewer interceptors and outfalls, if any.

26. Section 190.005(1)(a), Florida Statutes, also requires that the petition propose a timetable for construction and an estimate of construction costs. The petition must designate future general distribution, location, and extent of public and private uses of land in the future land use element of the appropriate general purpose local government. The petition must contain a Statement of Estimated Regulatory Costs.

27. Section 190.005(1)(b), Florida Statutes, requires that the petitioner pay a filing fee of \$15,000 to the county and to each municipality whose proposed boundaries are within or contiguous to the CDD. The petitioner also must serve a copy of the petition on those local, general-purpose governments.

28. Section 190.005(1)(c), Florida Statutes, permits the county and each municipality described in the preceding paragraph to conduct a public hearing on the petition. Such local, general-purpose governments may then present resolutions to FLWAC as to the establishment of a CDD on the property proposed in the Petition.

29. Section 190.005(1)(d), Florida Statutes, requires an ALJ to conduct a local public hearing pursuant to Chapter 120, Florida Statutes. The hearing "shall include oral and written comments on the petition pertinent to the factors specified in paragraph (e)." Section 190.005(1)(d) specifies that the petitioner publish notice of the local public hearing once a

week for the four successive weeks immediately prior to the hearing.

B. Factors by Law to be Considered for Granting or Denying Petition

30. Section 190.005(1)(e), Florida Statutes, provides that FLWAC consider the entire record of the local hearing, the transcript of the hearing, resolutions adopted by local general-purpose governments as provided in paragraph (c), and the following factors and make a determination to grant or deny a petition for the establishment of a community development district:

1. Whether all statements contained within the petition have been found to be true and correct.

2. Whether the establishment of the district is inconsistent with any applicable element of the effective local government comprehensive plan.

3. Whether the area of land within the district is of sufficient size, is sufficiently compact, and is sufficiently contiguous to be developable as one functional interrelated community.

4. Whether the district is the best alternative available for delivering community development services and facilities to the area that will be served by the district.

5. Whether the community development services and facilities of the district will be incompatible with the capacity and uses of existing local and regional community development services and facilities.

6. Whether the area that will be served by the district is amenable to separate special-district government.

COMPARISON OF INFORMATION IN RECORD TO APPLICABLE LAW

A. Procedural Requirements

31. The evidence was that Petitioner satisfied the procedural requirements for the establishment of a CDD on the proposed property by paying the \$15,000 filing fee, filing a petition in the proper form and with the required attachments, and publishing statutory notice of the local public hearing.

B. Six Factors of Section 190.005(1)(e), Florida Statutes

32. The evidence was that the statements in the Petition and its attachments are true and correct.

33. The evidence was that establishment by rule of the District on the proposed property in the petition is not inconsistent with the State and Lee County Comprehensive Plans. (Usually, through efficient provision of certain infrastructure, typically concurrent with the impacts of development, a properly-established CDD serves several provisions of comprehensive plans.)

34. The evidence was that the size, compactness, and contiguity of the proposed land area are sufficient for it to be developable as one functional interrelated community.

35. The evidence was that the CDD is the best alternative presently available for delivering community development systems, facilities, and services to the proposed land area.

36. The evidence was that the services and facilities provided by the CDD will be compatible with the capacity and uses of existing local and regional community development services and facilities.

37. The evidence was that the proposed area to be served by the state chartered CDD is amenable to separate special-district government.

CONCLUSION

Based on the record evidence, the Petition meets all statutory requirements, and there appears to be no reason not to grant the Petition and establish the proposed Cocohatchee Community Development District by rule. For purposes of drafting such a rule, a metes and bounds description of the proposed Cocohatchee CDD may be found in Appendix B, Petitioner's Composite Exhibit 2, B, 3; and the five persons designated to serve as the initial members of the Board of Supervisors of the Cocohatchee CDD are identified in paragraph 5

of the Petition, a copy of which is found in Petitioner's Composite Exhibit 2, B.

DONE AND ENTERED this 17th day of February, 2003, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of February, 2003.

COPIES FURNISHED:

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APPENDIX A

Petitioner's Witnesses:

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APPENDIX B

Petitioner Composite Exhibit 1:

A print-out copy of an email from the Assistant County Attorney, Dawn Perry-Lehnert, indicating that she would not be participating in this hearing because her client, the Lee County Board of County Commissioners, adopted a resolution in support of establishment

Petitioner Composite Exhibit 2:

A. Petitioner's Composite Exhibit "A":

A-1 General location map; a boundary map of the land area to be included within the jurisdiction of the District; and

A-2 The Lee County Comprehensive Plan future land-use map depicting the proposed land area to be serviced by the District and respective land use categories.

B. Petitioner's Composite Exhibit "B": The Petition with its exhibits:

B-1 Petition;

B-2 Petition Exhibit "1" showing the location of land area to be serviced by District as presently proposed;

B-3 Petition Exhibit "2" indicating metes and bounds legal descriptions;

B-4 Petition Exhibit "3" written consent by property owners/optionees;

B-5 Petition Exhibit "4" - Sewer Interceptors, Utilities and Outfalls Map;

B-6 Petition Exhibit "5" - Estimate of proposed timetables and related costs of construction and provision of District services and facilities;

B-7a Petition Exhibit "6-A" - Copy of the Future Land Use Map as provided for in the Future Land Use Element of the Lee County Comprehensive Plan;

B-7b Petition Exhibit "6-B" - 2000 version of applicable pages of the Lee County Comprehensive Plan;

B-7c Petition Exhibit "6-C" - Florida Department of Community Affairs Letter of Compliance dated 21 December 2001;

B-7d Petition Exhibit "6-D" - Notice of Intent;

B-8 Petition Exhibit "7" - Statement of Estimated Regulatory Costs.

C. Petitioner's Exhibit "C": Xeroxed copy of the document of receipt of the \$15,000 check to constitute the filing and processing fee paid by Petitioner.

D. Petitioner's Exhibit "D": Board of Lee County Commissioners' Resolution No. 03-01-25 supporting establishment of the District, with attached affidavit and tear sheet of the News-Press which constitutes proof of publication of notice of the Board of County Commissioners meeting on 14 January 2002.

E. Petitioner's Exhibit "E": Affidavit of Ken van Assenderp executed on 20 January 2003 regarding transmission of the Petition to Donna Arduin, Secretary, Florida Land and Water Adjudicatory Commission.

F. Petitioner's Composite Exhibit "F":

F-1 Letter of notification of 31 October 2002 from Donna Arduin, Secretary, Florida Land and Water Adjudicatory Commission to Cari Roth, Secretary, Department of Community Affairs for review of the petition;

F-2 Letter of notification of 31 October 2002 from Donna Arduin, Secretary, Florida Land and Water Adjudicatory Commission to Dave Burr, Executive Director, Southwest Florida Regional Planning Council for review of the petition.

G. Petitioner's Composite Exhibit "G":

G-1 Letter of 31 October 2002 from Donna Arduin, Secretary, Florida Land and Water Adjudicatory Commission transmitting the Petition, certifying compliance, to Sharyn Smith, Director, Division of Administrative Hearings;

G-2 Amended Initial Order dated 13 November 2002 signed by Sharyn Smith, Chief Judge, Division of Administrative Hearings, assigning the case to an Administrative Judge and summarizing procedures.

H. Petitioner's Composite Exhibit "H":

H-1 Notice of the hearing of 27 November 2002 in Bonita Springs to hear affected persons in regard to the establishment of the Cocohatchee Community Development District;

H-2 The Affidavit and tear sheet from the News-Press constituting proof of publication for the first week of notice;

H-3 The Affidavit and tear sheet from the News-Press constituting proof of publication for the second week of notice;

H-4 The Affidavit and tear sheet from the News-Press constituting proof of publication for the third week of notice;

H-5 The Affidavit and tear sheet from the News-Press constituting proof of publication for the fourth week of notice.

I. Petitioner's Exhibit "I": The complete official copy of the Lee County Comprehensive Plan, portions of which are attached to the Petition.

J. Petitioner's Exhibit "J": A copy of the most recent codification of the State Comprehensive Plan as it appears codified in Chapter 187, Florida Statutes (2001).

K. Petitioner's Composite Exhibit "K":

K-1 White paper of Robert D. Hutcherson, Planner and land use expert;

K-2 White paper of Joshua R. Evans, Professional Engineer and civil engineering expert.