

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: PETITION FOR RULE)
AMENDMENT - FIDDLER'S CREEK) Case No. 02-4357
COMMUNITY DEVELOPMENT DISTRICT.)
_____)

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

On January 23, 2003, a local public hearing was conducted in this matter in Naples, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

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For Landowners: Mark J. Woodward, Esquire
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STATEMENT OF THE "ISSUE"

At "issue" in this hearing was a petition to amend Rule 42X-1, Florida Administrative Code, to expand the boundaries of the Fiddler's Creek Community Development District (CDD) by

approximately 137 acres and simultaneously contract the boundaries by approximately 137 acres (for approximately no net change in overall total acreage), and to change its name by adding the numeral 1.

PRELIMINARY STATEMENT

On October 18, 2002, Fiddler's Creek CDD filed with the Florida Land and Water Adjudicatory Commission (FLAWAC) a Petition for Rulemaking to Amend the Boundaries and Amend the Name of the Fiddler's Creek Community Development District (Petition). Although the Petition asked FLAWAC to forward it to the CDD's Board of Supervisors for a local public hearing under Section 190.046(1)(d)4, Florida Statutes, FLAWAC instead referred the Petition to DOAH on November 6, 2002, for assignment of an ALJ to conduct a local public hearing under Section 190.005(1)(d), Florida Statutes. The local public hearing before the ALJ was scheduled for 9:00 a.m. on January 23, 2003, in the Collier County Courthouse in Naples, Florida.

Collier County, in whose unincorporated land area the CDD exists, entered into a Prehearing Stipulation with Petitioner as to all matters to be presented by Petitioner at the local public hearing, including the Resolution of the Board of County Commissioners of Collier County supporting the Petition. The Prehearing Stipulation was presented at the local public hearing

and became a part of Joint Composite Exhibit 1, which was received in evidence (Tr. 33).

The witnesses who testified during the local public hearing are identified in Appendix A to this Report; the Joint Composite Exhibits received during the local public hearing are described in Appendix B to this Report. After the local public hearing, Petitioner filed a proposed Report and Conclusions, with Recommendation to FLAWAC, which has been considered in the preparation of this Report.

SUMMARY OF HEARING

A. Petition and Related Matters

1. The 1,389-acre Fiddler's Creek CDD was established in 1996 by adoption of Rule 42X-1, Florida Administrative Code. It was part of a master plan for eventual development of a 3,900-acre luxury golf course community. Subsequently, it was decided to establish a second CDD using the Fiddler Creek name and to "square off" the boundaries of the two CDDs to make them more logical and easier to develop and manage. As part of the implementation of that decision, Collier County granted a petition to establish Fiddler's Creek CDD 2 on land in unincorporated Collier County which includes 137.38 acres that also are part of the original Fiddler's Creek CDD but not yet developed. The Petition at issue in this case seeks to amend Rule 42X-1 to contract out those 137.38 acres; to add a

different 137.38 acres to "square off" the original CDD and include all of a golf course and some development sites that currently are partially outside the boundaries of the original CDD; and to add the numeral 1 to the name of the original CDD so as to distinguish it from Fiddler's Creek CDD 2, which has been established by Collier County. The Petition alleges that, after the boundary amendments, the CDD would continue to serve approximately 1,389 acres.

2. Joint Composite Exhibit 1, B, is a copy of the Petition, with exhibits. However, for several reasons, the Petition Exhibits are clearer and more accurate than the copies furnished as part of Joint Composite Exhibit 1, B. As a result, the actual Petition Exhibits also are being furnished along with this Report.

3. The numbering of the Petition Exhibits in Joint Composite Exhibit 1, B, is somewhat confusing since the Petition itself was identified as Joint Composite Exhibit 1, B-1. As a result, Petition Exhibits 1 through 7 are identified as Joint Composite Exhibit 1, B-2 through B-8 (together with exhibit subparts where applicable.) Then, to confuse matters more, B-8 is repeated to also identify Petition Exhibit 8; as a result, Petition Exhibits 9 and 10 are identified as Joint Composite Exhibit 1, B-9 and B-10.

4. The Petition alleges that the "expansion parcel" and "contraction parcel" are described on location maps, respectively Exhibit "1-A" and Exhibit "1-B" to the Petition.

5. The Petition also alleges that the metes and bounds legal description of the boundaries of the existing CDD is set forth in Petition Exhibit "2-A"; the metes and bounds legal description of the expansion parcel is set forth in Petition Exhibit "2-B"; the metes and bounds legal description of the contraction parcel is set forth in Petition Exhibit "2-C"; and the proposed boundaries of the CDD after the proposed rule amendment is set forth in Petition Exhibit "2-D". However, the copies furnished as Joint Composite Exhibit 1, B-3, are not clearly labeled, are incomplete, and are difficult to read.

6. The Petition alleges that there is no real property within the proposed amended boundaries of the CDD to be excluded from the jurisdiction of the CDD. However, it does appear that enclaves exist within the existing CDD and will continue to exist within the proposed amended CDD. The larger enclaves are part of the "Marco Shores Unit 30 Golf Course," the plat of which is recorded in Plat Book 17 at pages 98 through 103 in the Public Records of Collier County. There also are other, smaller enclaves--one owned by the Collier County School Board (O.R. Book 1495, pages 384, 385, and 387), and one owned by Collier County (O.R. Book 1755, page 361). It does not appear from the

evidence that these enclaves have adversely affected the existing CDD or that they would adversely affect the CDD proposed to result from rule amendment.

7. The Petition alleges that Petition Exhibit "3-A", subsections (1) through (3), contains documentation constituting written consent of all landowners of the expansion parcel-- namely, GB Peninsula, Ltd., DY Land Associates, Ltd., and 951 Land Holdings, Ltd. These consents are worded in such a way that it is not clear whether all three jointly own all of the expansion parcel or whether the three own parts of the expansion parcel which, when combined, constitute the entire expansion parcel.

8. The Petition alleges that Petition Exhibit "3-B" contains Resolution 2002-01 of the Board of Supervisors of the existing CDD consenting to deletion of the contraction parcel.

9. The Petition did not allege that all landowners within the existing CDD consented in writing to the proposed simultaneous expansion and contraction. However, consent of the owners of the contraction parcel, GB Peninsula, Ltd., and 951 Land Holdings, Ltd., was put on the record of the local public hearing represented orally by attorney for the parcel owners at the hearing and was supplemented by written consent filed and offered on February 4, 2003, as Joint Composite Exhibit 2.

10. Paragraph 9 of the Petition sets forth the names of the five persons who have been duly and validly elected to the Board of Supervisors and who currently serve on the Board of Supervisors of the existing CDD.

11. The Petition provides a variety of information, also as required by Section 190.005(1), Florida Statutes, dealing with existing facilities; the proposed timetable and estimated cost of construction of additional systems, facilities, and services to be provided by the CDD to the expansion parcel (Petition Exhibit "5"); absence of any services or facilities currently being provided by the CDD to the contraction parcel; and various allegations about consistency with the Collier County plan.

12. The Petition alleges that Petition Exhibit "7" is the Statement of Estimated Regulatory Costs (SERC) required by Sections 120.541 and 190.005(1)(a)8, Florida Statutes. The Petition also acknowledges that any existing interlocal agreements between the existing CDD and the Collier County Water Sewer District will be maintained, honored, applied to the expansion parcel, but no longer to the contraction parcel.

13. The Petition attaches as Petition Exhibit "9" written discussions of planning and engineering aspects of the contraction and expansion by a qualified engineer and a qualified planner.

14. The Petition states that, after expansion, and if applicable, the CDD Board of Supervisors may petition Collier County to consent to the CDD's exercise of certain special powers under Section 190.012(2), Florida Statutes.

15. The Petition alleges that copies, together with a filing fee of \$1,500, were sent to Collier County on October 16, 2002, and alleges that none of the property is in the jurisdiction of any municipality.

16. The Petition asked FLAWAC to forward it to the CDD's Board of Supervisors for a local public hearing under Section 190.046(1)(d)4, Florida Statutes. Instead, FLAWAC referred the Petition to DOAH for assignment of an ALJ to conduct a local public hearing under Section 190.005(1)(d), Florida Statutes.

B. Additional Information from Local Public Hearing

17. The local public hearing on the Petition was noticed for January 23, 2003, in the Collier County Courthouse, an accessible location, in Naples, Florida. Notice of the hearing was advertised on January 1, 8, 15, and 22, 2003, in the Naples Daily News, a newspaper of general paid circulation in the county, and of general interest and readership in the community, not one of limited subject matter, pursuant to Chapter 50, Florida Statutes. The published notices gave the time and place for the hearing; a description of the area to be included in the CDD, including a map showing clearly the area to be covered by

the CDD; and other relevant information. The advertisements were not placed in that portion of the newspaper where legal notices and classified advertisements appear.

18. The hearing was commenced fifteen minutes after the noticed and scheduled time in order to give any persons who wanted to attend ample time to do so (Tr. 4). Appearances were made then by counsel for the petitioning CDD, for Collier County, and for the owners of the expansion and contraction parcels--951 Land Holdings, Ltd., G.B. Peninsula, Ltd., and DY Land Associates, Ltd. (Tr. 4-5). No one else attended the local public hearing except for witnesses for Petitioner.

19. The attorney representing Collier County explained that, in deciding to support the Petition, the County was specifically aware that a filing fee of \$1,500 was paid. The County accepted the \$1,500 filing fee as sufficient for three reasons. First, the County thought that \$1,500 was the applicable filing fee under Section 190.046(1), Florida Statutes, because the simultaneous expansion and contraction was a net "wash" in acreage. Second, the County thought Petitioner could have proceeded in two separate petitions, one for expansion and the other for contraction, each without tripping the statutory threshold. As argued by Petitioner in its proposed Report, "therefore, and accordingly, in order to save time, costs and space, to enter into the two separate expansion

and contraction processes by being one process is the legal equivalent of each of the separate processes." (However, under this rationale two fees of \$1,500 would be required, one for the expansion and one for the contraction.) Third, the County believed that \$1,500, together with the \$15,000 filing fee for the original establishment of the CDD in 1996, was more than enough to adequately compensate the County for the work of its staff in connection with both original establishment and the pending Petition.

20. Mark Woodward, Esquire, attorney representing 951 Land Holdings, G.B. Peninsula, and DY Land Holdings, was sworn and testified that the landowners he represents, owned not only the approximately 137.38-acre expansion parcel (for which written consents were included in the Petition), but also the approximately 137.38-acre contraction parcel. Woodward confirmed his clients' consent to contraction as well as expansion (Tr. 6-9). Woodward represented that he would obtain from his clients their written consent to contraction after the hearing and provide the written consent to Petitioner. This was done, and Petitioner filed the written consent on February 4, 2003, as Joint Composite Exhibit 2.

21. Woodward testified that the land proposed to be contracted out of the existing Fiddler's Creek CDD is included already in Fiddler's Creek Community Development District 2,

recently established by Collier County ordinance. He also explained that the proposed expansion would pick up portions of a golf course and development sites partially inside and partially outside the existing CDD so that the proposed new CDD boundaries would "square-up," be consistent, have an entire golf course within its boundaries, and not have any development sites straddling the boundary (Tr. 15).

22. The next witness was James Ward, vice president of Operations for Severn Trent Services and, in that capacity, manager of the existing Fiddler's Creek CDD. Ward concurred with Woodward's explanation of the purposes of the proposed simultaneous expansion and contraction. (Tr. 18). Ward also concurred that it is appropriate to "square-off" the boundaries for those reasons (Tr. 21, 32-33). Ward confirmed the payment of \$1,500 to Collier County for the processing fee, as alleged in the Petition, and testified that, to the best of his knowledge, all procedural requirements were met. Ward also was tendered and accepted as an expert capable of giving opinion testimony on management of CDDs and delivery of infrastructure to them (Tr. 31 - 32). Based on Ward's testimony, Joint Composite Exhibit 1 was received in evidence (Tr. 33).

23. The next witness was William Terry Cole, a civil engineer and a vice president of Hole Montes, Inc. (Tr. 34-35). Cole was tendered and accepted as an expert capable of giving

opinion testimony, from an engineering perspective, on different alternatives for the provision of infrastructure, including the alternative of a community development district (Tr. 36-38). He summarized and adopted his engineering "white paper," which is included in Petition Exhibit 9-A (also identified as Joint Composite Exhibit 1, B-9). In testimony as well as in his "white paper," Cole addressed the six factors listed under Section 190.005(1)(e), Florida Statutes, from an engineering perspective (Tr. 35). Cole testified that he had reviewed the Petition with its attached exhibits and that, to his best knowledge from an engineering perspective, the information is true and correct (Tr. 39). He then testified to reviewing the State Comprehensive Plan and the County Comprehensive Plan, specifically as to the proposed amendments of the boundaries of the existing CDD, by both expansion and contraction, as to whether such amendments would be inconsistent with the plans. His conclusion as an engineer was that they were in fact consistent with those plans (Tr. 39). With regard to the expansion parcel, and then the total land area to be serviced by the proposed expanded CDD, he determined that the land area of proposed CDD would be of sufficient size, sufficient compactness, and sufficient contiguity to be developed as one functional interrelated community (Tr. 39-40). He then testified that he did not find the expanded parcel, and the

entire land area as expanded, to be incompatible with any existing community development systems, services, or facilities in the land area as proposed to be amended by the rule (Tr. 40). He then testified that the land area proposed to be serviced by the CDD after the expansion would be amenable to separate CDD governance and that he had not discovered any problem with regard to this particular expansion parcel or related matters (Tr. 41). He then testified that, as a result of his evaluation of the statutory factors, he did not discover any problem that needed to be pointed out to the ALJ or FLAWAC (Tr. 41).

24. The next witness was Carey Garland, who was tendered and accepted as an expert witness capable of giving opinion testimony on SERCs and financial aspects of CDDs (Tr. 45). Garland then summarized the statutorily required elements of the SERC (Exhibit 7 to the Petition, and also identified as Joint Composite Exhibit 1, B-8), which was prepared by his colleague, Dr. Henry Fishkind, but reviewed and approved by Garland (Tr. 45). Garland specifically referred to the SERC's Table 1, noting that there will be, as a net result of the proposed simultaneous expansion and contraction, a total of eight additional dwelling units (Tr. 46). He indicated that the costs to state and local governmental entities as a result of this rule amendment will be marginal at best, quite small in relation to the overall budget of these governmental entities (Tr. 46-

47). He pointed out that the SERC makes a good faith estimate of the number of individuals and entities likely to be required to comply with such a rule amendment (Tr. 46). He indicated that there should be no impact on state and local revenues because the CDD has its own source of revenues (Tr. 46). He discussed the SERC's good faith estimate of the transactional cost to be incurred by individuals and entities within the CDD, as amended.

25. Garland pointed out that approximately \$3.8 million dollars of capital improvements are planned within the expansion area if the CDD boundary is amended; however, at the same time, approximately \$11.9 million dollars of capital improvement programs currently planned for the contraction parcel would not have to be undertaken (Tr. 47). The net result is a reduction of infrastructure of approximately \$8 million dollars. Garland then summarized the CDD's assessment methodology and how the assessments would be used to pay off the bonds, testifying that the CDD's assessment report properly and fairly determines and apportions assessments based on land use categories. He pointed out that additional units coming into the expansion area would be subject to the already-adopted assessment methodology for the existing, petitioning CDD (Tr. 47). As a result, new homeowners in the land area within the CDD, as amended, would pay an

assessment equal to the assessments of like-situated persons, within each land use category (Tr. 48).

26. Garland testified that, although there will be a net \$8 million reduction in capital improvements, there probably would not be any addition or reduction in the assessment to any of the property of the homeowners within the CDD, as amended, because there is such a low number of net new units (Tr. 49). However, the evidence was not clear, for comparison purposes, as to the total capital costs for the CDD, as amended (Tr. 51). There also was no exact evidence as to the total number of dwelling units expected for the CDD, as amended. But there was evidence that more than 3,000 dwelling units are expected to be developed within the 3,000, plus, acres in the master-planned Fiddler's Creek Community Development, consisting of both the CDD 1, as amended, and the County-established CDD 2 (SERC p.1, Joint Composite Exhibit 1, B-8, Petition Exhibit 7). (There also was evidence that the precise total acreage of the master-planned community is 3,921 acres. See page 2 of Petition Exhibit 9-B, also identified as Joint Composite Exhibit B-9a.) If density in the proposed amended CDD is proportionate, there would be approximately 1,389 units in the CDD.

27. Garland testified that, while developers on occasion will "buy down" a bond when assessments are too high, he did not

expect that to happen in the case of this CDD, as amended (Tr. 51).

28. Garland acknowledged that his comments addressed only the infrastructure capital side, not the maintenance side. He stated that the CDD's Manager, James Ward, could opine as to how the amendment would affect the maintenance side. However, Ward did not testify on the subject.

29. Garland also testified that the SERC assessed the impact on small businesses as being a positive impact since the CDD has to bid its projects out in the public, giving small businesses the opportunity to bid and get work (Tr. 51-52). Garland stated that Collier County is not a small county so that the requirement to assess impact on small counties is not applicable to this Petition (Tr. 52). Garland concluded by stating that he had not discovered any problems from a financial, economic, or estimated regulatory cost standpoint that would arise from this proposed expansion or contraction (Tr. 52).

30. The last witness to testify was Mr. Michael Redd, who was accepted as an expert capable of giving opinion testimony on alternative ways to deliver infrastructure to planned community developments from a land use planning perspective. He adopted his planning "white paper" in Petition Exhibit 9-B (also identified as Joint Composite Exhibit 1, B-9a). He also

testified from his planning perspective as to the six factors listed in Section 190.005(1)(e), Florida Statutes. As to the first factor, he stated that he had reviewed the Petition and its attachments and determined that they were correct and true (Tr. 56). He then testified that he had compared and reviewed the proposed amendments in the light of the state comprehensive plan and the county comprehensive plan and concluded that they would not be inconsistent with either of the plans (Tr. 57). He determined from a planning perspective that the land area was of sufficient size, sufficient compactness, and sufficient contiguity to function as an interrelated functional community, even and expressly after the proposed simultaneous expansion and contraction (Tr. 57-58). He then testified that the proposed CDD, as amended, was very compatible with existing local and regional community development services (Tr. 58). He also testified that the proposed amended CDD would be amenable to separate CDD government (Tr. 58). He saw no problems that needed to be pointed out as to any of those factors. He concluded, based on consideration of those factors, that the CDD, as amended, would be the best alternative for delivery of services (Tr. 59).

APPLICABLE LAW

31. Chapter 190, Florida Statutes, creates a local unit of special-purpose government called a "community development

district," which has the power to function specifically as prescribed by statute for the delivery of urban community development systems, facilities and services.

32. Section 190.005(1), Florida Statutes, provides:

The exclusive and uniform method for the establishment of a community development district with a size of 1,000 acres or more shall be pursuant to a rule, adopted under chapter 120 by the Florida Land and Water Adjudicatory Commission, granting a petition for the establishment of a community development district.

(a) A petition for the establishment of a community development district shall be filed by the petitioner with the Florida Land and Water Adjudicatory Commission. The petition shall contain:

1. A metes and bounds description of the external boundaries of the district. Any real property within the external boundaries of the district which is to be excluded from the district shall be specifically described, and the last known address of all owners of such real property shall be listed. The petition shall also address the impact of the proposed district on any real property within the external boundaries of the district which is to be excluded from the district.

2. The written consent to the establishment of the district by all landowners whose real property is to be included in the district or documentation demonstrating that the petitioner has control by deed, trust agreement, contract, or option of 100 percent of the real property to be included in the district, and when real property to be included in the district is owned by a governmental entity and subject to a ground lease as described in s. 190.003(13), the written consent by such governmental entity.

3. A designation of five persons to be the initial members of the board of supervisors,

who shall serve in that office until replaced by elected members as provided in s. 190.006.

4. The proposed name of the district.

5. A map of the proposed district showing current major trunk water mains and sewer interceptors and outfalls if in existence.

6. Based upon available data, the proposed timetable for construction of the district services and the estimated cost of constructing the proposed services. These estimates shall be submitted in good faith but shall not be binding and may be subject to change.

7. A designation of the future general distribution, location, and extent of public and private uses of land proposed for the area within the district by the future land use plan element of the effective local government comprehensive plan of which all mandatory elements have been adopted by the applicable general-purpose local government in compliance with the Local Government Comprehensive Planning and Land Development Regulation Act.

8. A statement of estimated regulatory costs in accordance with the requirements of s. 120.541.

(b) Prior to filing the petition, the petitioner shall:

1. Pay a filing fee of \$15,000 to the county and to each municipality the boundaries of which are contiguous with, or contain all or a portion of the land within, the external boundaries of the district.

2. Submit a copy of the petition to the county and to each municipality the boundaries of which are contiguous with, or contain all or a portion of, the land within the external boundaries of the district.

(c) Such county and each such municipality may conduct a public hearing to consider the relationship of the petition to the factors specified in paragraph (e). The public hearing shall be concluded within 45 days after the date the petition is filed unless an extension of time is requested by the

petitioner and granted by the county or municipality. The county or municipality holding such public hearing may by resolution express its support of, or objection to the granting of, the petition by the Florida Land and Water Adjudicatory Commission. A resolution must base any objection to the granting of the petition upon the factors specified in paragraph (e). Such county or municipality may present its resolution of support or objection at the Florida Land and Water Adjudicatory Commission hearing and shall be afforded an opportunity to present relevant information in support of its resolution.

(d) A local public hearing on the petition shall be conducted by a hearing officer in conformance with the applicable requirements and procedures of the Administrative Procedure Act. The hearing shall include oral and written comments on the petition pertinent to the factors specified in paragraph (e). The hearing shall be held at an accessible location in the county in which the community development district is to be located. The petitioner shall cause a notice of the hearing to be published in a newspaper at least once a week for the 4 successive weeks immediately prior to the hearing. Such notice shall give the time and place for the hearing, a description of the area to be included in the district, which description shall include a map showing clearly the area to be covered by the district, and any other relevant information which the establishing governing bodies may require. The advertisement shall not be placed in that portion of the newspaper where legal notices and classified advertisements appear. The advertisement shall be published in a newspaper of general paid circulation in the county and of general interest and readership in the community, not one of limited subject matter, pursuant to chapter 50. Whenever possible, the advertisement shall appear in a newspaper that is published at least 5

days a week, unless the only newspaper in the community is published fewer than 5 days a week. All affected units of general-purpose local government and the general public shall be given an opportunity to appear at the hearing and present oral or written comments on the petition.

(e) The Florida Land and Water Adjudicatory Commission shall 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 or portion of the state comprehensive plan or of the effective local government comprehensive plan.
3. Whether the area of land within the proposed 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.

(f) The Florida Land and Water Adjudicatory Commission shall not adopt any rule which would expand, modify, or delete any provision of the uniform community development district charter as set forth in

ss. 190.006-190.041, except as provided in s. 190.012. A rule establishing a community development district shall:

1. Describe the external boundaries of the district and any real property within the external boundaries of the district which is to be excluded.
2. Name five persons designated to be the initial members of the board of supervisors.
3. Name the district.

(g) The Florida Land and Water Adjudicatory Commission may adopt rules setting forth its procedures for considering petitions to establish, expand, modify, or delete uniform community development districts or portions thereof consistent with the provisions of this section.

Most of the rules of procedure adopted by FLAWAC have been repealed, and none of those remaining specifically address expansion, contraction, or modification of a CDD. Subsection (2) of the statute provides for a method of establishing CDDs of less than 1,000 acres by county ordinance.

33. Section 190.046(1), Florida Statutes, provides in pertinent part:

The board may petition to contract or expand the boundaries of a community development district in the following manner:

(a) The petition shall contain the same information required by s. 190.005(1)(a)1. and 8. In addition, if the petitioner seeks to expand the district, the petition shall describe the proposed timetable for construction of any district services to the area, the estimated cost of constructing the proposed services, and the designation of the future general distribution, location, and extent of public and private uses of land proposed for the area by the future land use plan element of the adopted local

government local comprehensive plan. If the petitioner seeks to contract the district, the petition shall describe what services and facilities are currently provided by the district to the area being removed, and the designation of the future general distribution, location, and extent of public and private uses of land proposed for the area by the future land element of the adopted local government comprehensive plan.

(b) For those districts initially established by county ordinance, the petition for ordinance amendment shall be filed with the county commission. If the land to be included or excluded is, in whole or in part, within the boundaries of a municipality, then the county commission shall not amend the ordinance without municipal approval. A public hearing shall be held in the same manner and with the same public notice as other ordinance amendments. The county commission shall consider the record of the public hearing and the factors set forth in s. 190.005(1)(e) in making its determination to grant or deny the petition for ordinance amendment.

(c) For those districts initially established by municipal ordinance pursuant to s. 190.005(2)(e), the municipality shall assume the duties of the county commission set forth in paragraph (b); however, if any of the land to be included or excluded, in whole or in part, is outside the boundaries of the municipality, then the municipality shall not amend its ordinance without county commission approval.

(d) 1. For those districts initially established by administrative rule pursuant to s. 190.005(1), the petition shall be filed with the Florida Land and Water Adjudicatory Commission.

2. Prior to filing the petition, the petitioner shall pay a filing fee of \$1,500 to the county and to each municipality the boundaries of which are contiguous with or contain all or a portion of the land within the district or the proposed amendment, and

submit a copy of the petition to the county and to each such municipality. In addition, if the district is not the petitioner, the petitioner shall file the petition with the district board of supervisors.

3. The county and each municipality shall have the option of holding a public hearing as provided by s. 190.005(1)(c). However, such public hearing shall be limited to consideration of the contents of the petition and whether the petition for amendment should be supported by the county or municipality.

4. The district board of supervisors shall, in lieu of a hearing officer, hold the local public hearing provided for by s. 190.005(1)(d). This local public hearing shall be noticed in the same manner as provided in s. 190.005(1)(d). Within 45 days of the conclusion of the hearing, the district board of supervisors shall transmit to the Florida Land and Water Adjudicatory Commission the full record of the local hearing, the transcript of the hearing, any resolutions adopted by the local general-purpose governments, and its recommendation whether to grant the petition for amendment. The commission shall then proceed in accordance with s. 190.005(1)(e).

5. A rule amending a district boundary shall describe the land to be added or deleted.

(e) In all cases, written consent of all the landowners whose land is to be added to or deleted from the district shall be required. The filing of the petition for expansion or contraction by the district board of supervisors shall constitute consent of the landowners within the district other than of landowners whose land is proposed to be added to or removed from the district.

(f) 1. During the existence of a district initially established by administrative rule, petitions to amend the boundaries of the district pursuant to paragraphs (a)-(e) shall be limited to a cumulative total of no

more than 10 percent of the land in the initial district, and in no event shall all such petitions to amend the boundaries ever encompass more than a total of 250 acres.

2. For districts initially established by county or municipal ordinance, the limitation provided by this paragraph shall be a cumulative total of no more than 50 percent of the land in the initial district, and in no event shall all such petitions to amend the boundaries ever encompass more than a total of 500 acres.

3. Boundary expansions for districts initially established by county or municipal ordinance shall follow the procedure set forth in paragraph (b) or paragraph (c).

(g) Petitions to amend the boundaries of the district which exceed the amount of land specified in paragraph (f) shall be considered petitions to establish a new district and shall follow all of the procedures specified in s. 190.005.

There is no statutory (or rule) authority for changing the name of an existing CDD except by merger under Section 190.046(3), Florida Statutes.

COMPARISON OF INFORMATION IN RECORD TO APPLICABLE LAW

34. Although the Petition appeared to request processing under Section 190.046(1)(a)-(e), Florida Statutes, and specifically requested that FLAWAC forward the Petition to the CDD's Board of Supervisors for a local public hearing under subparagraph (d)4. of that statute, FLAWAC declined the request, but instead referred the Petition to DOAH for assignment of an ALJ to conduct a local public hearing under Section 190.005(1)(d), Florida Statutes. Petitioner now concedes that

its Petition to expand the 1,389-acre Fiddler's Creek CDD by 137 acres and simultaneously contract it by 137 acres exceeds the limitation in Section 190.046(1)(f)-(g), Florida Statutes, for petitions to amend the boundaries of a CDD pursuant to paragraphs (a)-(e) of that statute.

35. Not only does Section 190.046(1)(f)-(g), Florida Statutes, require that the local public hearing on boundary amendment petitions exceeding the statutory threshold be held before an ALJ under Section 190.005(1)(d), Florida Statutes, it also clearly provides that "petitions to amend the boundaries of the district pursuant to paragraphs (a)-(e) shall be limited" to boundary amendment petitions within the statutory threshold and that boundary amendment petitions exceeding the threshold "shall be considered petitions to establish a new district and shall follow all of the procedures specified in s. 190.005."

(Emphasis added.)

36. Notwithstanding the seemingly clear statutory language, FLAWAC has granted petitions for boundary amendments exceeding the Section 190.046(1)(f)-(g), Florida Statutes, limits where, as in this case, consent of all landowners of the proposed amended CDD was not provided, as required under Section 190.005(1)(a)2, Florida Statutes. See In Re: Petition to Contract the Gateway Services District, DOAH Case No. 02-1334, WL (DOAH Report August 9, 2002)(Rule adopted November 12, 2002);

In Re: Petition to Contract Tampa Palms Open Space and Transportation Community Development District, DOAH Case No. 96-4213, 1997 WL 1052656 (DOAH Report January 29, 1997)(Rule adopted July 31, 1997). In the Gateway case, the apparent rationale was that filing of a petition to expand or contract the boundaries of a CDD constitutes "consent of the landowners within the district other than of landowners whose land is proposed to be added to or removed from the district," as provided under Section 190.046(1)(e), Florida Statutes, although subparagraphs (g)-(f) state that subparagraph (e) does not apply when the acreage limitations are exceeded. The Tampa Palms case was decided before the 1999 rule amendment adding that language to subparagraph (e).

37. Similarly, FLAWAC has granted petitions for boundary amendments exceeding the Section 190.046(1)(f)-(g), Florida Statutes, limits where, as in this case, the local government did not require payment of the full \$15,000 filing fee under Section 190.005(1)(b)2, Florida Statutes. See In Re: Petition to Contract the Circle Square Woods Community Development District, DOAH Case No. 02-1118, 2002 WL 1592404 (DOAH Report June 24, 2002)(Rule adopted October 1, 2002)(County waived the filing fee). In this case, Collier County accepted \$1,500 as payment in full, waiving any additional fee, because of the net "wash" of expansions and contraction acreage and because that

amount more than paid for County staff work in connection with this CDD.

38. In its proposed Report, Petitioner also argued the following justification for limiting the required fee to \$1,500 in this case:

Because the District was established initially by administrative rule by FLAWAC, pursuant to Section 190.005(1), Florida Statutes, the District, as the Petitioner, was required to pay a processing or filing fee to the Collier County for its staff to process the amendment petition. The procedure in Section 190.005(1)(b), requires a filing fee to be paid to the county. The amount of the filing fee for establishment of a district of [sic] \$15,000.00 under this subsection. However, the filing fee in fact submitted is \$1,500.00 because, though proceeding under the establishment procedures, (because it was assessed as exceeding the threshold for the abbreviated process), the process is not "establishment" but rather "amendment", so that the fee paid was \$1,500.00, substantively, under Section 190.046(1)(d)2, Florida Statutes.

Petitioner also pointed out the County's rationale for not requiring the full \$15,000. See paragraph 19, supra.

39. Except as to written consent and addressing the impacts on the enclaves, the Petition met the content requirements of Section 190.005(1)(a), Florida Statutes.

40. Except for payment of a \$15,000 filing fee, Petitioner met the pre-filing requirements of Section 190.005(1)(b), Florida Statutes.

41. Collier County exercised the option under Section 190.005(1)(c), Florida Statutes, of holding a public hearing to consider the Petition and resolved to support the Petition.

42. All procedural and notice requirements for local public hearings under Section 190.005(1)(d), Florida Statutes, were met.

43. As for factor 1 under Section 190.005(1)(e), Florida Statutes, the evidence was that all statements in the Petition were true and correct, except for the statement: "There is no real property within the proposed amended boundaries of the District which is to be excluded from the jurisdiction of the District." While that is true of the expansion parcel, it is not true as to the existing CDD. However, those "enclaves" are "specifically described," and "the last known address of all owners of such real property" is "listed," i.e., reflected on the metes and bounds description. Section 190.005(1)(a)1, Florida Statutes. While the Petition does not "address the impact of the proposed district on any real property within the external boundaries of the district which is to be excluded from the district," there does not appear to be any impact on those properties by the CDD, either existing or as proposed. Id.

44. As for factor 2 under Section 190.005(1)(e), Florida Statutes, the evidence was that "establishment of the district

is [not] inconsistent with any applicable element of the effective local government comprehensive plan."

45. As for factor 3 under Section 190.005(1)(e), Florida Statutes, the evidence was that "the area of land within the proposed district is of sufficient size, is sufficiently compact, and is sufficiently contiguous to be developable as one functional interrelated community."

46. As for factor 4 under Section 190.005(1)(e), Florida Statutes, the evidence was that "the district is the best alternative available for delivering community development services and facilities to the area that will be served by the district."

47. As for factor 5 under Section 190.005(1)(e), Florida Statutes, the evidence was that "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."

48. As for factor 6 under Section 190.005(1)(e), Florida Statutes, the evidence was that "the area that will be served by the district is amenable to separate special-district government."

CONCLUSION

49. Section 190.005(1)(d), Florida Statutes, provides that the local public hearing "shall be conducted . . . in conformance with the applicable requirements and procedures of the Administrative Procedure Act." However, this is not a quasi-judicial, adversarial proceeding under Sections 120.569 and 120.57, Florida Statutes, for resolution of factual disputes. Rather, it is a quasi-legislative, information-gathering hearing that is part of the rulemaking process. Section 120.54(8), Florida Statutes, describes the Rulemaking Record as including: "(c) A written summary of hearings on the proposed rule." For these reasons, a recommended order with findings of fact and conclusions of law is not appropriate. Instead, the ALJ files a report which constitutes the hearing summary portion of the rulemaking record under Section 120.54(8)(c), Florida Statutes. Section 190.005(1)(e), Florida Statutes, states that FLAWAC "shall consider the entire record of the local hearing, the transcript of the hearing, resolutions adopted by local general-purpose governments," and the factors listed in that subparagraph.

REPORT SUBMITTED this 25th 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 25th day of February, 2003.

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APPENDIX A

Petitioner's Witnesses:

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APPENDIX B

Exhibits

Joint Composite Exhibit 1
(Received into record January 23, 2003)

Exhibit A:

General Location Map and the Collier County Comprehensive
Plan Future Land Use Map

Exhibit B:

Petition for Rulemaking to Amend the Boundaries and Amend
the Name of the Fiddler's Creek Community Development District

Exhibit C:

Miscellaneous Transmittal Documents

- a. Xeroxed Copy of the Document of Receipt of the \$1,500
Check to Constitute Filing and Processing Fee Paid by Petitioner
- b. Receipt of Service FLAWAC
- c. Receipt of Service Collier County

Exhibit D:

Official signed, dated and certified Collier County
resolution supporting the Petition of the Board of County
Commissioners supporting the Petition to amend the boundaries of
the CDD and changing the name of the existing CDD.

Exhibit E:

Affidavit of Ken van Assenderp executed on January 20,
2003, stating his law firm serves as Petitioner for the
Fiddler's Creek Community Development District; and on
October 18, 2002, stating the firm filed a copy of the petition
with the Florida Land and Water Adjudicatory Commission and
submitted a copy to Collier County on October 16, 2002.

Exhibit F:

FLAWAC Secretary Donna Arduin letters

- a. Letter of notification from Secretary Arduin and to
General Counsel Roth of Florida Department of Community Affairs

b. Letter of notification from Secretary Arduin to Executive Director Paltry of the Southwest Florida Regional Planning Council

c. Letter of notification from Secretary Arduin to Director of the Division of Administrative Hearings

Exhibit G:

Miscellaneous documents.

a. Order dated November 12, 2002, signed by Sharyn Smith, Chief Judge, Division of Administrative Hearings, assigning the case to an Administrative Judge and summarizing procedures.

b. Compliance Response to Initial Order signed and submitted to the Florida Land and Water Adjudicatory Commission on December 9, 2002, by Ken van Assenderp

Exhibit H:

Notice of Hearing

a. Notice of hearing signed on November 27, 2002, by the ALJ, stating time, date and location of hearing

b. Affidavit of Publication from the "Naples Daily News" constituting proof of publication for the first week through fourth week of notice

Exhibit I:

Official copy of the Collier County Comprehensive Plan

Exhibit J:

Copy of most recent codification of the State Comprehensive Plan as it appears codified in Chapter 187, Florida Statutes, (2001)

Exhibit K:

White Papers

a. White paper of Michael Redd, Planner and land use expert with vita sheet.

b. Pre-filed testimony of W. Terry Cole, Professional Engineer and civil engineering expert with vita sheet

Joint Composite Exhibit 2:

Landowner's Consent to Contract District9