

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: PETITION FOR RULE)
CREATION - TESORO COMMUNITY) Case No. 04-1042
DEVELOPMENT DISTRICT.)
_____)

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

On May 25, 2004, a local public hearing under Section 190.005(1)(d), Florida Statutes (2003),¹ was conducted in Port St. Lucie, Florida, by J. Lawrence Johnston, Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: William G. Capko, Esquire
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STATEMENT OF THE ISSUE

The issue before the Florida Land and Water Adjudicatory Commission (FLWAC) in this proceeding is whether to grant the Petition to Establish the Tesoro Community Development District (Petition), dated December 22, 2003, as supplemented and corrected. The local public hearing was for purposes of gathering information in anticipation of quasi-legislative rulemaking by FLWAC.²

PRELIMINARY STATEMENT

The Petition was filed by Ginn-LA St. Lucie Ltd., LLLP, a Georgia limited partnership (Petitioner), on December 23, 2003. It requested that FLWAC adopt a rule to establish a state-chartered uniform community development district, to be called the Tesoro Community Development District (District or CDD), on certain property in the City of Port St. Lucie, which is located in St. Lucie County, Florida.

FLWAC reviewed the Petition and issued a Notice of Insufficiency and Request for Additional Information (NOIRAI). On February 26, 2004, Petitioner filed a Response to the NOIRAI.³

On March 19, 2004, the Secretary of FLWAC certified that the Petition, as supplemented, contained all required elements and forwarded the Petition and Response to the NOIRAI to DOAH 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 and was held at 2:00 p.m., on May 25, 2004, in the City Community Center, Port St. Lucie, St. Lucie County, Florida. On May 21, 2004, Petitioner pre-filed the testimony of its two witnesses: Doug Miller, Vice-President of Development for the Southern Region of The Ginn Company; and Richard P. Hans, a provider of development and CDD management advice and services employed by Severn Trent Services, Inc. At the local public hearing,

Petitioner presented the testimony of its witnesses and also introduced and had admitted in evidence five exhibits (Hearing Exhibits A through E), which are described in paragraphs 1, 2, 14, 16, 18, and 21 of the Summary of Record, infra. No member of the general public participated, and no other testimony or evidence was presented.

On June 30, 2004, Petitioner filed the Transcript of the local public hearing and a Proposed Report to FLWAC, which has been considered in the preparation of this Report. As used in this Report, Hearing Exhibit means an exhibit introduced and admitted in evidence during the local public hearing, and Petition Exhibit means an exhibit attached to the Petition.

SUMMARY OF RECORD

A. Petition and Related Matters

1. The Petition (a copy of which was introduced and accepted in evidence at the local public hearing as part of Hearing Exhibit D) alleges that the land for the District is located entirely within the City of Port St. Lucie in St. Lucie County, Florida. Petition Exhibit 1 depicts the location and describes the metes and bounds of the external boundaries of the District. The proposed District covers approximately 1,416 acres of land. As shown on Petition Exhibit 1, the only parcels of real property within the external boundaries of the District that are excluded from the District are the waters of Blakeslee

Creek and Winters Creek and the right-of-way of Southbend Boulevard.

2. The Response to NOIRAI (also part of Hearing Exhibit D) explained Petitioner's belief that Blakeslee Creek and Winters Creek are believed by Petitioner to be sovereign state lands under the control of the Trustees of the Internal Improvement Trust Fund and that establishment of the proposed CDD would have no impact on those creeks except for increased protection through stormwater management and wetland mitigation facilities to be maintained by the proposed CDD. Petitioner also stated that Southbend Boulevard was owned by Petitioner, would be conveyed to the City of Port St. Lucie for use as a public roadway, and would not be impacted by the proposed CDD.

3. Petition Exhibit 2 contains a list of the many non-governmental owners of property within the boundaries of the proposed District, other than Petitioner, who were said to have given written consent to establishment of the District. Petition Exhibit 2 also contains representative samples of the "voluminous" written consents of those property owners to establishment of the District. Petition Exhibit 2 also includes an excerpt from the Declaration of Covenants, Restrictions and Easements for Tesoro, recorded April 9, 2002, which disclosed the possible establishment of a uniform community development district under Chapter 190, Florida Statutes, on all or part of

the lands within Tesoro's boundaries (as well as possibly on lands outside its boundaries).

4. The Response to NOIRAI clarified that the proposed District does not include any real property owned by a governmental entity. It also included as Exhibit 1 to the Response an updated list of landowners, other than Petitioner, who have consented to establishment of the proposed CDD, as well as copies of the executed the written consents for each of those landowners, as Exhibit 2 to the Response.⁴ Exhibit 3 to the Response was a copy of an excerpt from the Second Amended and Restated Declaration of Covenants, Restrictions and Easements for Tesoro, recorded on September 19, 2003, which also disclosed the possible establishment of a uniform community development district under Chapter 190, Florida Statutes, on all or part of the lands within Tesoro's boundaries (as well as possibly on lands outside its boundaries).

5. The Petition names those designated to be the five initial members of the Board of Supervisors of the proposed District--Michael Sayre, Cindy Ford, Thomas Knowles, Richard Hohman, and Joseph Butler. The identical address (3228 SW Martin Downs Boulevard, Suite 5, Palm City, Florida 34990) is listed for each of them. The Petition states that each is a resident of the State of Florida and a citizen of the United States of America.

6. In the Response to NOIRAI, two changes to the initial Board of Supervisors were made, so that the five proposed initial members of the Board of Supervisors became Robert Kerner, Cindy Ford, Thomas Knowles, Richard Hohman, and Todd White, all with the same address--3228 SW Martin Downs Boulevard, Suite 5, Palm City, Florida 34990. The Response did not specify the residency and citizenship of the two new members.

7. The Petition states that the name of the proposed District will be the "Tesoro Community Development District."

8. The Petition states that the future general distribution, location, and extent of the public and private land uses proposed with the District, as well as the existing major trunk water mains and sewer interceptors in the area of the proposed District, are shown on Petition Exhibit 3, which consists of a drawing of Tesoro CDD's Master Drainage and Utilities, dated September 22, 2003. Petition Exhibit 4 is a drawing of Tesoro CDD's Surface Water Management and Utility Plan, dated August 28, 2003.

9. The Petition alleges that Petitioner "presently intends for the District to participate in the provision of certain infrastructure improvements limited primarily to stormwater management and wetlands mitigation." (Paragraph 8) However, it states: "The Petitioner is funding the initial capital costs of

these facilities, which are estimated to total \$4,000,000. Construction of these improvements is underway with completion estimated in late 2004. Upon completion, the District will maintain the stormwater management system and wetland mitigation facilities." (Id.) The Petition states that actual construction timetables and expenditures will likely vary, due in part to the effects of future changes in the economic and market conditions.

10. The Petition alleges that, prior to filing with FLWAC, copies were sent to the City of Port St. Lucie and to St. Lucie County, along with the proffer of a filing fee of \$15,000 to each of those local governments.

11. The Petition alleges that its Exhibit 5 is a Statement of Estimated Regulatory Costs (SERC) prepared in accordance with the requirements of Section 120.541, Florida Statutes. The SERC reports that the proposed District is to provide for the operation and maintenance and the ownership of stormwater management and wetlands mitigation facilities for an ongoing development within its boundaries, with the initial funding for those facilities--approximately \$4 million--to be provided by the developer. Costs to various state entities are said to be "the marginal cost of processing one additional set of reports," "inconsequential," and offset by the annual fee to the Department of Community Affairs required under Section 189.412,

Florida Statutes. Costs to the City of Port St. Lucie related to the establishment of the proposed District are said to be "modest" for several reasons and offset by the filing fee required under Section 190.005(1), Florida Statutes. Annual costs to the City for receiving and reviewing various required reports are said to be "very small" or "minimal."

12. The Petition alleges that it should be granted according to the factors listed in Section 190.005(1)(e), Florida Statutes.

B. Additional Information from Local Public Hearing

13. On May 7, 2004, FLWAC published a Notice of Receipt of Petition in the Florida Administrative Weekly. (Hearing Exhibit B, Exhibit DM-4)

14. The local public hearing on the Petition was noticed for and was held on May 25, 2004, in the City Community Center, Port St. Lucie, St. Lucie County, Florida. The notice was published in a newspaper of general paid circulation in St. Lucie County (The Fort Pierce and Port St. Lucie Tribune) for four consecutive weeks, on April 30, 2004, May 6, 2004, May 12, 2004, and May 18, 2004. (Hearing Exhibit A; Transcript, page 9, lines 20-23) 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.

15. At the local public hearing, appearances were made by counsel for the petitioning CDD. Despite public notice, no member of the general public attended.

16. Petitioner's first witness, Doug Miller, adopted his pre-filed testimony, which was introduced and accepted in evidence as Hearing Exhibit B, with two exceptions.

17. Mr. Miller clarified that the correct answer to Question 32 of his pre-filed testimony, asking whether the contents of the Petition and its exhibits were true and correct, should have been "no." Mr. Miller explained that the Petition incorrectly stated that all proposed land uses within the District were "subject to the approved Tesoro Development of Regional Impact Development Orders (the 'DRI')." (Paragraph 6) Actually, the project is being developed as a planned unit development (PUD) which is vested and therefore not required to undergo DRI review; therefore, all proposed land uses within the District are subject to the Tesoro PUD, not to a DRI.

(Transcript, page 8, lines 4-12) Mr. Miller similarly explained that his pre-filed answer to Question 44, which asked whether he was familiar with the DRI development orders governing the Tesoro development, should have been "no," but would have been

"yes," if it had asked whether he was familiar with the PUD governing the development. (Transcript, page 8, lines 13-20)

18. With those two exceptions, the hearing testimony of Mr. Miller adopted his pre-filed testimony. Petitioner's other witness, Richard P. Hans, adopted his pre-filed testimony, which was introduced and accepted in evidence as Hearing Exhibit E, in its entirety.

19. Mr. Miller's adopted pre-filed testimony was that each of the initial members of the Board of Supervisors of the proposed CDD listed in the Response to NOIRAI is a resident of the State of Florida and a citizen of the United States of America.

20. Mr. Miller's hearing testimony confirmed that the filing fees proffered to the City of Port St. Lucie and to St. Lucie County have not been accepted. He testified that the City Manager "recognized the fact that this was going to be really no overhead expenses for the City." Mr. Miller understood that, for this reason, both the City and the County waived the filing fees. (Transcript, page 16-17).

21. Mr. Miller's pre-filed testimony explained that additional consents will continue to be obtained as Petitioner continues to sell lots in the Tesoro development and that Petitioner will further "supplement the record accordingly if and when we have any additional closings on lots prior to the

establishment of the proposed District." (Hearing Exhibit B, page 4, lines 1-9) As part of his hearing testimony, Mr. Miller sponsored Hearing Exhibit C, which further supplemented the landowner consent information previously provided in the Petition and in the Response to the NOIRAI by listing subsequent purchasers who likewise consented to the establishment of the proposed CDD through the land purchase contracts and closing process described in the Petition and Response to NOIRAI. Although Hearing Exhibit C did not include copies of the newly-executed written consents, it would appear that, as a result of the land purchase contracts and closing process, all owners of land within the proposed District as of the time of the local public hearing have given written consent to establishment of the District.

Factor 1- Petition True and Correct

22. Mr. Miller's pre-filed testimony was that the Petition and its exhibits, with the exception of the SERC, were prepared by him or prepared under his supervision. (Hearing Exhibit B, page 3, lines 11-16) He stated that the Petition and its exhibits were true and correct to the best of his knowledge. (Hearing Exhibit B, page 3, line 17, through page 4, line 28)

23. Mr. Hans testified that his associate, Rhonda Archer, prepared the SERC and that it was true and accurate to the best

of his knowledge. (Hearing Exhibit E, page 3, line 40, through page 4, line 5)

24. Based on the evidence, the Petition and its exhibits, as supplemented and corrected, are true and correct.

Factor 2 - Consistency with Comprehensive Plans

25. Mr. Miller reviewed the proposed District in light of the requirements of the State Comprehensive Plan (Chapter 187, Florida Statutes) and the City of Port St. Lucie Comprehensive Plan and testified that the proposed District is not inconsistent with any applicable provisions of those plans. (Hearing Exhibit B, page 8, lines 1-34)

26. In addition, the Florida Department of Community Affairs reviewed the Petition and found that the proposed land uses within the District are consistent with the City of Port St. Lucie Comprehensive Plan. (Hearing Exhibit B, page 6, lines 18-23, and Exhibit DM-6)

27. Based upon the evidence in the record, the proposed District will not be inconsistent with any applicable element or portion of the State Comprehensive Plan or the City of Port St. Lucie Comprehensive Plan.

Factor 3 - Sufficient Size and Compactness

28. As Mr. Hans testified, 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. (Hearing Exhibit E, page 2, lines 19-28)

Factor 4 - Best Alternative

29. As indicated in the Petition, Petitioner intends for the District to participate in the provision of only certain infrastructure improvements, limited primarily to stormwater management and wetlands mitigation. (Hearing Exhibit B, page 7, lines 10-12) Petitioner is funding the initial capital costs of these facilities, which are estimated to total \$4,000,000. (Id. at lines 7-18)

30. Petitioner does not expect that the District will finance any services or improvements through the issuance of tax-exempt bonds. (Id. at lines 19-23) Certain facilities within the proposed District are being funded by the issuance by the City of Port St. Lucie of its \$49,375,000 Special Assessment Bonds for the Tesoro Special Assessment District. (Id. at lines 24-26)

31. Ongoing District maintenance and operational activities are expected to be funded by maintenance assessments. (Id. at lines 27-29) Mr. Miller explained that both the South Florida Water Management District and the United States Army Corps of Engineers "strongly recommended" the establishment of a uniform community development district for this purpose "due to the extensive quantity of created wetlands [40 acres] . . .

constructed on the site and also the significance of the drainage system [which also "conveys storm water to the City of Port St. Lucie through it"] to the local area." (Id. at page 14, lines 8-16)

32. Property owners within the proposed District, including the current landowners, will be responsible for paying District assessments. (Id. at lines 34-35) As indicated, it is not anticipated that the proposed District will issue general obligation debt which pledges the full faith and credit of the proposed District. (Id. at lines 35-37)

33. Mr. Hans testified that in general terms that "the proposed District is the best alternative available for providing the proposed community development services and facilities to the area served." (Hearing Exhibit E, page 3, lines 26-38) Mr. Miller testified more specifically that the proposed District is the best alternative to provide these community development services and facilities to the area to be served within the proposed District. (Hearing Exhibit B, page 9, lines 20-22) He opined in more general terms that the proposed District would be more effective than a typical property owners' or homeowners' association attempting to work with general purpose governments to ensure that necessary public infrastructure improvements are provided in a timely and efficient manner. (Id.) He then specified that the proposed

District is a long-term, stable, perpetual entity capable of maintaining the stormwater and wetlands mitigation facilities over the lifetime of the facilities. (Id. at lines 32-34)

Factor 5 - Compatibility with Existing Capacity and Uses

34. Mr. Hans testified that the "proposed community development services and facilities of the proposed District are not incompatible with the capacity and uses of existing local or regional community development services and facilities and the proposed District provides logical, efficient extension of existing systems into targeted development areas." (Hearing Exhibit E, page 2, lines 39-43) He opined the reason for this: "There is no duplication of the proposed District's anticipated improvements and services. No other entity has planned to provide the improvements and services contemplated by the proposed District under the Petition." (Id., page 3, lines 1-4)

Factor 6 - Amenability to Separate Government

35. Mr. Hans also testified that the area that will be served by the District is amenable to separate special district government. (Id., page 3, lines 14-16) He stated that the proposed District provides for an efficient mechanism to oversee the installation and maintenance of capital improvements necessary for development. (Id., page 3, lines 20-22) He also testified that the proposed District's size, compactness, and

contiguity warrant separate special district government. (Id., page 3, lines 22-24)

APPLICABLE LAW

A. General

36. 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 in 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.)

37. 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.

38. 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 SERC.

39. 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.

40. FLWAC has granted petitions for boundary amendments exceeding the limits in Section 190.046(1)(f)-(g), Florida Statutes, where, as in this case, the local government did not require payment of the \$15,000 filing fee required under Section 190.005(1)(b)2, Florida Statutes. See In Re: Petition For Rule Amendment - Fiddler's Creek Community Development District, DOAH Case No. Case No. 02-4357, 2003 WL 603380, *13 (DOAH Report February 25, 2003)(Rule adopted September 16, 2003)(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 the CDD); In Re Petition to Contract the Circle Square Woods Community Development District, DOAH Case No. 02-1118, 2002 WL 1592404, *7 (DOAH Report June 24, 2002)(Rule adopted October 1, 2002)(County waived the filing fee). It is not believed that a CDD has been initially established by FLWAC where the required fees were waived.

41. 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. No such public hearing was held on the Petition in this case.

42. Section 190.005(1)(d), Florida Statutes, requires that a DOAH ALJ 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). . . . 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." § 190.005(1)(d), Fla. Stat.

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

43. Section 190.005(1)(e), Florida Statutes, provides that FLWAC consider the entire record of the local hearing, the transcript of the hearing, any 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.

COMPARISON OF INFORMATION IN RECORD TO APPLICABLE LAW

A. Procedural Requirements

44. The evidence was that the Petition, as supplemented and corrected, was filed in the proper form and with the required attachments; that the required \$15,000 filing fees were proffered to the applicable local governments, which waived them; and that the statutorily-required notice of the local public hearing was published.

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

45. The evidence was that the statements in the Petition and its attachments, as supplemented and corrected, are true and correct.

46. The evidence was that establishment of the proposed CDD on the proposed property is not inconsistent with the State Comprehensive Plan or the City of Port St. Lucie Comprehensive Plan.

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

48. The evidence was that the proposed CDD is the best alternative presently available for delivering the community development systems, facilities, and services proposed for the land area to be included in the CDD--i.e., ownership, operation, and maintenance of the surface water management systems and wetlands mitigation areas. It is not clear from the evidence in the record that a CDD is the best alternative available for delivering other community development systems, facilities, and services for the land area to be included in the CDD. In this case, they are being provided through other means.

49. The evidence was that the services and facilities to be provided by the proposed CDD will be compatible with the capacity and uses of existing local and regional community development services and facilities. It is not clear from the evidence in the record that provision of other services and facilities, if provided by the proposed CDD, would be compatible with the capacity and uses of existing local and regional community development services and facilities.

50. The evidence was that the proposed area to be served by the proposed CDD is amenable to separate special-district government. However, in this case, only limited services are to be provided by the proposed CDD. Nonetheless, Section 190.004(1), Florida Statutes, provides: "This act constitutes the sole authorization for the future establishment of

independent community development districts which have any of the specialized functions and powers provided by this act."

(Emphasis added.)

CONCLUSION

Section 190.005(1)(e), Florida Statutes, states that FLWAC "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. Based on the record evidence, as supplemented and corrected, the Petition appears to meet all statutory requirements, and there appears to be no compelling reason not to grant the Petition, as supplemented and corrected, and establish the proposed Tesoro Community Development District by rule.⁵

DONE AND ENTERED this 13th day of July, 2004, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of July, 2004.

ENDNOTES

- 1/ All references to Florida Statutes are to the 2003 codification.
- 2/ 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.
- 3/ The NOIRAI is not in the record, but the Response is.
- 4/ Exhibit 2 to the Response to NOIRAI indicates that it consisted of "3 boxes of executed Contracts for Lot Purchase for each landowner." The record does not reflect that FLWAC forwarded these boxes to DOAH, and they were not introduced in evidence during the local public hearing.
- 5/ For purposes of drafting such a rule, Petitioner's Proposed Report to FLWAC included Appendix C, consisting of Petitioner's Text of Proposed Rule.

COPIES FURNISHED:

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